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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1205

DAVID A. GOLDNER,
Petitioner,

v.

EDWARD S. SILVER,
District Attorney, Kings County, State of New York,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BERNARD A. BERKMAN,
LARRY S. GORDON,
JOSHUA J. KANCELBAUM,
GERALD A. MESSERMAN,
1320 Superior Building,
Cleveland, Ohio 44114,
Counsel for Petitioner.

EDWYN SILBERLING,
1501 Franklin Avenue,
Mineola, New York 11501,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Citations to Opinions Below ---- 2

Jurisdiction ---- 2

Questions Presented ---- 3

Constitutional Provisions Involved ---- 4

Statement ---- 5

I. Preliminary Statement ---- 5

II. Facts ---- 8

A. Obtaining and Withholding Records ---- 8

B. Inability to Defend ---- 9

C. Referee's Finding of Guilt of Uncharged Offense ---- 13

Reasons for Granting the Writ ---- 16

I. Petitioner's Records Were Seized by a General and Roving Search in Violation of the Fourth and Fourteenth Amendments ---- 24

A. The Fourth Amendment exclusionary rule applies to disbarment proceedings ---- 25

B. The broad subpoena violated the Fourth Amendment ---- 31

II. The State's Retention of Petitioner's Records for the Entire Three-Year Period Prior to Trial and Throughout the Trial Denied Petitioner Due Process of Law ---- 33

III. The Finding Against Petitioner on a Charge of Which He Was Never Notified in Advance of Hearing and Against Which He Had No Opportunity to Defend Denied Petitioner Due Process of Law ---- 37

IV. Appellant Has Neither Waived Nor Acquiesced in the Violation of His Constitutional Rights ---- 40

Conclusion 42

Appendix ..... Separately Printed

TABLE OF AUTHORITIES.

Cases.

Abel v. United States, 362 U.S. 217 (1960) 27, 28

Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937) 40

Amos v. United States, 255 U.S. 313 (1921) 40

Anastoplo, In re, 366 U.S. 82 (1961) 20, 41

Azzarello v. Legal Aid Society, 117 Ohio App. 471, 185 N.E. 2d 566 (1963) 21

Boyd v. United States, 116 U.S. 616 (1886) 27, 29, 30, 32

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964) 17, 18

Brown v. Board of Education, 347 U.S. 483 (1954) 21

Burdeau v. McDowell, 256 U.S. 465 (1921) 25

Chicago v. Lord, 3 Ill. App. 2d 410, 122 N.E. 2d 439 (1954), *affirmed* 7 Ill. 2d 379, 130 N.E. 2d 504 (1955) 28

Cohen v. Hurley, 366 U.S. 117 (1961) 19, 20, 28, 29, 30

Cohen, Re, 199 N.Y.S. 2d 658 (1960), affirmed *Cohen v. Hurley*, 366 U.S. 117 (1961) 41, 42

Cole v. Arkansas, 333 U.S. 196 (1948) 39

DeJong v. Oregon, 299 U.S. 353 (1937) 39

Dennis v. United States, 384 U.S. 855 (1966) 17

District of Columbia v. Little, 178 F. 2d 13, *affirmed on other grounds*, 339 U.S. 1 (1950) 27

Dombrowski v. Pfister, 380 U.S. 479 (1965) 18

Douglas v. California, 372 U.S. 353 (1963) 18

Elkins v. United States, 364 U.S. 206 (1960) ____25, 26
Essgee Company of China v. United States, 262 U.S. 151 (1923) ____ 32
Fahy v. Connecticut, 375 U.S. 85 (1963) ____ 38
Fay v. Noia, 372 U.S. 391 (1963) ____ 18
Fed. Trade Comm. v. American Tobacco Co., 264 U.S. 298 (1924) ____ 33
Feldman v. United States, 322 U.S. 487 (1944) ____ 30
Frank v. Maryland, 359 U.S. 360 (1959) ____ 27
Garland, Ex parte, 71 U.S. (4 Wall.) 333 (1866) ____ 20
Garrison v. Louisiana, 379 U.S. 64 (1964) ____ 21
Garrity v. New Jersey, 385 U.S. 493 (1967) ____ 40
Gault, In re, 387 U.S. 1 (1967) ____17, 18 22, 36, 39
Gideon v. Wainwright, 372 U.S. 335 (1963) ____18, 35
Gilbert v. California, 388 U.S. U.S. 263 (1967) ____ 35
Giles v. Maryland, 386 U.S. 66 (1966) ____ 17
Greene v. McElroy, 360 U.S. 474 (1959) ____34, 36, 37
Hackin v. Arizona, 389 U.S. 143 (1967) ____ 25
Hale v. Henkel, 201 U.S. 43 (1906) ____ 33
Hamilton v. Alabama, 368 U.S. 52 (1961) ____ 18
Hartman v. Hartman, 253 Wis. 389, 34 N.W. 137 (1948) ____ 28
Harris v. United States, 331 U.S. 145 (1947) ____ 32
Henry v. United States, 361 U.S. 98 (1959) ____ 32
Holt v. Virginia, 381 U.S. 131 (1965) ____ 21
Jencks v. United States, 353 U.S. 657 (1957) ____ 34
Johnson v. United States, 333 U.S. 10 (1948) ____ 40
Johnson v. Zerbst, 304 U.S. 458 (1938) ____ 40

Konigsberg v. State Bar of California, 353 U.S. 252 (1957) ---------- 19, 20, 43

Konigsberg v. State Bar of California, 366 U.S. 36 (1961) ---------- 20, 41

Lebel v. Swincicki, 354 Mich. 427, 93 N.W. 2d 281 (1958) ---------- 28

Levy, Application of, 214 F. 2d 331 (5th Cir. 1954) rev'd per curiam 348 U.S. 978 (1955) ---------- 20

Linkletter v. Walker, 381 U.S. 618 (1965) ---------- 24

Malloy v. Hogan, 378 U.S. 1 (1964) ---------- 29, 30

Mapp v. Ohio, 367 U.S. 643 (1961) ---------- 24, 25, 26, 30, 31

Marcus v. Search Warrant, 367 U.S. 717 (1961) ---------- 32

Marron v. United States, 275 U.S. 192 (1927) ---------- 32

Maryland v. Baltimore Radio Show, 338 U.S. 1912 (1950) ---------- 16

Mempa v. Rhay, 389 U.S. 128 (1967) ---------- 17

Miranda v. Arizona, 384 U.S. 436 (1966) ---------- 17

NAACP v. Button, 371 U.S. 415 (1963) ---------- 17, 18

Nelson v. United States, 208 F. 2d 505 (D. C. Cir. 1953), *cert. den.* 346 U.S. 827 (1953) ---------- 40

Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960) ---------- 27

Okla. Press Pub. Co. v. Walling, 327 U.S. 186 (1946) 33

Oliver, In re, 333 U.S. 257 (1948) ---------- 34, 36, 37

Olmstead v. United States, 277 U.S. 438 (1928) ---------- 26

Pointer v. Texas, 380 U.S. 400 (1965) ---------- 35

Powell v. Alabama, 287 U.S. 45 (1933) ---------- 35

Roviaro v. United States, 353 U.S. 53 (1957) ---------- 34

Sacher v. Ass'n. of the Bar of the City of New York, 347 U.S. 388 (1954) ---------- 20

Sackler v. Sackler, 229 N.Y.S. 2d 61 (1962) ____27, 28

Sawyer, In re, 360 U.S. 622 (1959) _____ 20

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) _____19, 20

Sheppard v. Maxwell, 384 U.S. 333 (1966) _____ 16

Sheppard v. Ohio, 352 U.S. 910 (1956) _____ 16

Spevack v. Klein, 385 U.S. 511 (1967) _____ _____7, 20, 22, 29, 30, 31, 36, 37, 39

Stanton v. Embry, 93 U.S. 548 (1876) _____ 22

Summers, In re, 325 U.S. 561 (1945) _____ 20

Taylor v. Bemis, 110 U.S. 42 (1884) _____ 22

Thompson v. Louisville, 363 U.S. 199 (1960) _____ 39

Townsend v. Sain, 372 U.S. 293 (1963) _____ 18

Turner v. Louisiana, 379 U.S. 466 (1965) _____ 36

United Mine Workers v. Illinois State Bar Ass'n., ____ U.S. ____, 88 S. Ct. 353 (1967) _____17, 18

United States v. Wade, 388 U.S. 218, 18 L. Ed. 2d 1149 (1967) _____17, 35

White v. Maryland, 373 U.S. 59 (1963) _____ 18

Williams v. United States, 282 F. 2d 940 (6th Cir. 1960) _____ 25

Willner, In re, 348 U.S. 955 (1955) _____ 16

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) _____16, 19, 22, 36, 41

Wolf v. Colorado, 338 U.S. 25 (1949) _____24, 30

Wylie v. Cox, 20 U. S. (15 How.) 415 (1853) _____ 22

Constitutions.

Constitution of the United States:
Fourth Amendment 3, 4, 24, 25, 28, 30, 31, 32
Fifth Amendment 3, 4, 29, 30
Sixth Amendment 3, 4, 35, 37
Fourteenth Amendment 3, 4, 20, 34, 35, 36, 37

Other.

Brownell, *A Decade of Progress: Legal Aid and Defender Services,* 47 A.B.A.J. 867 (1961) 17

Cheatham, *The Supreme Court and the Profession of Law,* 14 Cath. U.L.R. 192, 197 (1965) 18

Clarlin & Howard, *Legal Representation and Class Justice,* 12 U.C.L.A. L. Rev. 381 (1965) 17

Kunstler, *The Case for Courage* (Morrow, 1962) 16

MacKinnon, *Contingent Fees in Legal Services,* 209 (1964) 22

Morgan, *A Time to Speak* (1964) 21

New Yorker, November 4, 1967, pp. 173-176 21

Pollitt, *Counsel for the Unpopular Cause,* 43 N.C.L. Rev. 11 (1964) 17, 21

Sparer, *The Role of the Welfare Client's Lawyer,* 12 U.C.L.A. L. Rev. 361 (1965) 17

Wolfram, *John Lilburne: Democracy's Pillar of Fire,* 3 Syracuse L. Rev. 213, 236 (1952) 21

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OCTOBER TERM, 1967.

No. _____.

DAVID A. GOLDNER,

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v.

EDWARD S. SILVER,
District Attorney, Kings County, State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of New York, entered in this cause on December 7, 1967, amending the remittitur upon application for reargument. The amendment, without altering the order of permanent disbarment affirmed by that court on March 26, 1964, reads as follows:

> "Upon the hearing of the motion for reargument of the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States to wit: The appellant argued that he had been deprived of his constitutional rights in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States in each of the following respects: (1) Appellant's disbarment proceeding was constitutionally defective; (2) appellant's records were confiscated by an unconstitutional general search; (3) appellant was denied access to his records to prepare a defense and avail himself of

the effective assistance of counsel; (4) appellant was found guilty of an offense with which he had not been charged in violation of due process of law; and (5) appellant has neither waived nor acquiesced in the violation of his constitutional rights. The Court of Appeals held that there was no violation of any right guaranteed to him by the Constitution of the United States in any of the above respects."

CITATIONS TO OPINIONS BELOW.

The Report of the Special Referee is unreported and is printed in Appendix B, *infra*, pp. 4a-55a.

The memorandum opinion of the Appellate Division, printed in Appendix B, *infra*, pp. 56a-57a, is reported in 15 A.D. 2d 558, 222 N.Y.S. 2d 854 (December 27, 1961).

The order of the Court of Appeals of New York (March 26, 1964), which affirmed the order of disbarment of the Appellate Division without opinion, is printed in Appendix B, *infra*, pp. 57a-59a.

The denial of the petition for writ of certiorari by the United States Supreme Court is reported at 379 U.S. 959 (1965).

The denial of the petition for rehearing by the United States Supreme Court is reported at 380 U.S. 926 (1965).

The order of the Court of Appeals of New York (December 7, 1967) which amended the remittitur is unreported and is printed in Appendix B, *infra*, pp. 59a-60a.

JURISDICTION.

The judgment of the Court of Appeals of the State of New York was entered on December 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I. Whether seizure of all of an attorney's books, cancelled checks, cash books, ledgers, check stubs, tax returns, bank books, records of all investments and all financial records, both business and personal, for an indeterminate period pursuant to a subpoena *duces tecum* issued by a grand jury to one of a number of lawyers whose conduct was under general investigation was so broad as to constitute an illegal search within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

II. Whether, after timely demand, the refusal of the state district attorney, state and federal courts and the state Judicial Inquiry to return petitioner's books and records during the three year interval between their seizure pursuant to subpoena in November, 1957 and the disciplinary hearing in December, 1960, and their failure to make all such records available to the defense during the hearing deprived petitioner of his right to prepare a defense, his right to counsel and his right to confrontation of witnesses in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

III. Whether petitioner's disbarment as a result of a finding against him in his disciplinary hearing on charges which had never been made against him prior to the hearing, and against which he had no opportunity to defend before the ruling against him, violated the Due Process clause of the Fourteenth Amendment.

IV. Whether an attorney who complies with a broad subpoena under circumstances where his failure to do so would subject him to discipline of the state bar association has waived or acquiesced in the violation of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED.

The pertinent portions of the provisions of the United States Constitution here involved are set out below:

Amendment XIV, Section 1, Clause 2:

"* * * nor shall any State deprive any person of life, liberty, or property without due process of law * * *."

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him * * * and to have the assistance of counsel for his defense."

STATEMENT.

I. PRELIMINARY STATEMENT.

Petitioner was admitted to practice law in New York in 1949. After a period of apprenticeship with another firm, he established his own office and developed an active practice in negligence cases. (H. 426-429.) [1]

This case involves an order of disbarment and related orders made by the Appellate Division, Second Judicial Department of New York, pursuant to findings and recommendations of a Special Referee appointed to conduct the disciplinary hearing in question. The disbarment proceeding grew out of a judicial inquiry ordered by the Appellate Division, Second Department, into solicitation and related practices in Kings County, New York.

As part of the Judicial Inquiry's investigation, on November 15, 1957, petitioner was served with a subpoena requiring him to produce for the Inquiry's examination his tax returns for the years 1953 through 1956, inclusive, and all of his personal and business records, tax returns, bank books, check stubs and cancelled checks for an indeterminate period of time. (SR. 118-129; Appendix A, pp. 1a-3a. Upon compulsion of disbarment for failure to cooperate with the Inquiry, petitioner complied with the terms of the broad and sweeping subpoena (SR. 32, 74, 83, 120). He testified before the Inquiry on two occasions in May and June of 1958 (SR. 33, 84). Thereafter, the Appellate Division, Second Judicial Department, ordered the District Attorney's office to proceed against the

---

[1] The transcript of the hearing before the Special Referee is referred to throughout as "H" followed by a page reference. The Report of the Special Referee is referred to as "Report." The Supplemental Record is referred to as "SR." Numerical references following "SR" are to folios unless otherwise indicated.

petitioner, and a petition charging 33 counts of misconduct was served. The matter was referred to a Special Referee, who, after a hearing, found the petitioner guilty on three of the counts contained in the petition. Petitioner was also found guilty of perjury—a charge which was nowhere contained in the petition and of which he had no notice prior to the written opinion of the Special Referee.

During the three-year hiatus between the issuance of the subpoena and the hearing, the petitioner made repeated attempts to get back his books and records. Oral and written requests for their return were made to the Presiding Justice of the Inquiry, and to the District Attorney; application for the return and suppression of such evidence was made to the federal district court and the Appellate Division, Second Judicial Department, on at least two occasions, all to no avail. (SR. 75-84; 181-183.) The federal constitutional questions involving illegal search and seizure were raised throughout these proceedings. (SR. 75-76, 77-82, 82-83.) No court order ever issued authorizing the impounding of petitioner's records. The books and papers seized were vital to the preparation and presentation of the petitioner's defense because they comprised all financial records petitioner had made during the period covered by the charges against him. Yet the Judicial Inquiry and the District Attorney's Office never returned the records. Indeed, they were admittedly used by the agents of the Judicial Inquiry to develop evidence that petitioner handled settlement payments to his clients improperly.

The Special Referee heard testimony in the proceeding against petitioner from December 1, 1960 until December 7, 1960. After the hearing, the Special Referee recommended disbarment (Report, pp. 60-61). Thereafter, several motions were made before the Appellate

Division. The District Attorney moved to confirm the Referee's Report. Petitioner opposed the motion and moved to set aside the report because the use of illegally seized evidence at the hearing "violated the constitutional guarantees against illegal and unreasonable search and seizure" and because withholding of the seized evidence from petitioner "was a deprivation of due process." (SR. 67-69.) Petitioner's motion to set aside the report was denied (SR. 61-66). Respondent's motion to confirm the report was granted and petitioner was ordered disbarred (App. B, pp. 56a-57a). The Court's memorandum opinion is reported at 15 App. Div. 2d 558, 222 N.Y.S. 2d 854. On March 26, 1964, the New York Court of Appeals affirmed the order of disbarment without opinion. (App. B, pp. 57a-59a.) On January 18, 1965, this Court denied certiorari, 379 U.S. 959. On September 9, 1967, after this Court's decision in *Spevack v. Klein*, 385 U.S. 511 (1967), petitioner filed an application in the New York Court of Appeals to reargue the appeal from the order of disbarment and related orders originally made by the Appellate Division, Second Department. On December 7, 1967, the Court of Appeals, treating petitioner's application as a motion to amend the remittitur, amended the remittitur of the Appellate Division, Second Department as follows: "Upon the hearing of the motion for reargument of the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, to wit: The appellant argued that he had been deprived of his constitutional rights in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States in each of the following respects: (1) Appellant's disbarment proceeding was constitutionally defective; (2) appellant's records were confiscated by an unconstitutional general search; (3) appel-

lant was denied access to his records to prepare a defense and avail himself of the effective assistance of counsel; (4) appellant was found guilty of an offense with which he had not been charged in violation of due process of law; and (5) appellant has neither waived nor acquiesced in the violation of his constitutional rights. The Court of Appeals held that there was no violation of any right guaranteed to him by the Constitution of the United States in any of the above respects."

It is from this order that petitioner seeks relief by petition for certiorari in this Court.

II. FACTS.

A. Obtaining and Withholding Records.

As part of the Judicial Inquiry's investigation into solicitation and related practices in Kings County, the petitioner was served on November 15, 1957 with a subpoena requiring him to produce for the Inquiry's examination all of his business and personal financial records, his day book, cash receipts books, cash disbursements book, petty cash book and vouchers, general ledger and journal, cancelled checks and bank statements, pass book and other evidences of accounts, current and closed, records of investments, and payroll records (all without limit as to time periods) and state and federal tax returns for the years 1953 through 1956. The subpoena called for both specified generic items and "any and all financial records pertaining to [his] business and/or person not itemized above." These records were taken from him on December 3, 1957 by agents of the Judicial Inquiry. The attorney representing petitioner orally requested the Judicial Inquiry counsel to return these records. On March 7, 1958 and again on March 14, 1958, this request was

made in writing. The requests were not answered, and the records were not returned. The petitioner testified before the inquiry in May and June, 1958. On October 31, 1958, the petitioner sought an order in the United States District Court for the Southern District of New York for the return of his records. This order was refused, on the ground that the application was premature because petitioner had not exhausted state remedies. The petitioner then moved before the Appellate Division, Second Department, for the return of his records on November 13, 1958, and amended his motion on November 19, 1958 to prohibit the use of these records against him. These motions were denied with leave to move before an additional Special Term of the Supreme Court. A motion made in the said Term on January 7, 1959 for the return of the records and/or their suppression was denied. The federal constitutional questions were raised throughout these proceedings.

Thereafter, the Appellate Division, Second Department, ordered the District Attorney's office to proceed against the petitioner and a petition charging misconduct was served. Petitioner attempted once more to get his records back. He wrote to the District Attorney on September 20, 1960 requesting the return of his records in order to properly prepare his defense. The records were not returned.

B. Inability to Defend.

A few examples will illustrate how completely the confiscation of petitioner's books and records handcuffed the defense at the hearing.

On direct examination of the accountant, through whom the confiscated documentary evidence was admitted and whose conclusions as an expert witness were largely

responsible for the Special Referee's findings of fact relating to subornation and perjury:

> "Q. Was there any explanation in the books as to what this $700 was for? A. May I see that check, please? Is there a check stub? *I will have to bring his check stubs over.*
>
> Q. *We have them in the office.* A. *There is nothing on here that would say.*
>
> Special Referee: You have nothing before you now in the absence of the check book itself which might possibly have a notation on the stub to give an explanation.
>
> The Witness: That is right, Your Honor * * *." (H. 220.) (Emphasis supplied.)

And on cross-examination of the same witness:

> "Q. Our records indicate that on that date you said there was a check in Dascoli—for $100 to Dr. Marcus—and you have it for $25.00. A. Is that check No. 6960?
>
> Q. *I haven't got that, I am sorry. You have all our checks and I can't tell you that.* A. *The only thing you can do * * * is mark this down and I'd have to check it. That's the only thing I can do. I haven't got it here* * **" (H. 274). (Emphasis supplied.)

Petitioner's own testimony demonstrates dramatically the handicap under which the defense was laboring. For example, on direct examination:

> "Q. What was the check in between? I notice one for $500, dated December 10, 1954, check #6782, and this one is dated December 13, 1954 for $4000, check #6784. What was the one in between? A. *I don't know, I don't have my books.* But it could have been a check in reference to the case, something, something outstanding" (H. 460a). Emphasis supplied.)

And on cross-examination of the petitioner:

"Q. * * * I show you these two checks which are now marked respectively Petitioner's Exhibits 17 and 18 in the Zucker case, one for a thousand dollars and one for $2,983.50 and point out to you that they bear the numbers respectively 5206 and 5207 and are dated—one dated March 19 and the other dated March 19—and I ask you whether or not this check numbered 5204 made to the order of James A. Citroen in the sum of $700.00 dated March 12, 1954, is in connection with the Zucker case.

The Witness: *Your Honor, I would like to see what check number 5205 which is missing, which might give me some idea of it—*

Special Referee: Do you have those records here?

Mr. DiBlasi (Assistant District Attorney): In the meantime, Judge, *maybe I can straighten it out with his own record,* if I may be permitted to ask him a question.

Special Referee: All right. 5205—is this check for twenty dollars to Dr. Abraham Cohen?

The Witness: *Yes, there's one thing else that would really help me. They have my checkbook stubs.* May I see that?

Special Referee: Go ahead, Mr. DiBlasi.

Q. Is that the check? A. Yes, but I question what case it is for * * * *This is taken from the checkbook stub. You know, those stubs that I turned in to you fellows, to the Judicial Inquiry * * * From that I could tell. Not from this. This isn't the accountant's entry* * * *

Q. Directing your attention to Petitioner's Exhibit 32, which is the check for $700.00, that was made to Citroen in payment for services rendered in connection with the Zucker case? A. *I still tell you. I don't know without looking at the checkstub book.* (H. 614-617). (Emphasis supplied.)

Further on cross-examination of the petitioner:

"Q. You wouldn't charge petty cash to a particular case in a ledger? A. No, not that I know of.

Q. And you know that. You know that to be a fact? A. I think so. As far as I know. *I'm not sure, but I haven't even looked at the books before I gave them and asked for them back. I haven't seen them in at least three years.*" (H. 602.) (Emphasis supplied.)

Further cross-examination:

"Special Referee: Didn't you say so?

The Witness: Yes. That the retainer was, as I recalled, signed in September. That's what I recall.

Q. You say a previous letter—

Mr. Gittleson: (defense counsel): *May I respectfully ask if our friend has the file. They took it away. They have it somewhere. If they have it why don't we get to the retainer?*

Mr. DiBlasi: *I have no file.* * * *

Special Referee: All right. Proceed. (H. 659.) (Emphasis supplied.)

Further, in response to inquiries regarding his checks:

"The Witness: *No, they have those. I furnished those over to the Inquiry.*

Mr. DiBlasi: *We don't have them. He turned them over to the Inquiry but they never furnished them over to us.*

Special Referee: *There is a sharp issue of fact here. This man's right to remain a member of the bar may very well be at stake* * * * (H. 731.) (Emphasis supplied.)

Finally, the following colloquy:

"Mr. Gittleson: *So that the record is straight, we made demand for the production of the original check, but due to the confusion that existed they weren't*

produced. I think they will concede that they had our checks.

Special Referee: When you say you made demand, I assume you mean on the Judicial Inquiry?

Mr. Gittleson: No, we made the demand on Mr. DiBlasi.

Special Referee: All right, is there anything else on cross?

Mr. DiBlasi: *My staff had looked for them, but weren't able to find any checks in this matter.* * * * (H. 780-781.) (Emphasis supplied.)

C. Referee's Finding of Guilt of Uncharged Offense.

The Referee dismissed all but three of the thirty-three (33) charges made against petitioner. In addition, the Special Referee found the petitioner guilty of perjury—a charge which was nowhere contained in the petition and of which petitioner had no notice prior to the written opinion of the Special Referee.

His crucial findings were as follows (Report, pp. 60-61):

> 1. That the Respondent failed to provide clients in some instances 'with statements relative to the settlement and disposition of their cases' as required by Rule 4-B of the Rules of the Appellate Division, First Department. (Charge 7-v. * * *)
>
> 2. That 'Respondent divided fees for legal services with persons other than lawyers for services rendered by such persons in the settlement of legal claims or suits in violation of Canon 34,' to wit, with one James Citroen. (Charge 7-z. * * *)
>
> 3. That 'Respondent wilfully procured and induced clients and witnesses' specifically Dominic Dascoli and Gilbert Zucker 'to testify falsely on hearings being conducted by an additional Special Term of the Supreme Court into the conduct of attorneys

and others' and more specifically 'that Respondent told them to state that they had received the proceeds of certain checks issued in their respective names when, in truth, they had not.' (Charge 7-aa. * * *) and

4. That Respondent committed perjury before me in his testimony with reference to the so-called 'yellow sheets' and the alleged retention by his various clients of the proceeds of the 'smaller' checks herein dealt with by reason of which he is unfit to remain a member of the profession of the law.

I should add that if Items 1 and 2 above were alone involved I would recommend that the punishment to be imposed upon the Respondent be a severe censure.

The crucial findings of the Referee are numbers 3 and 4 and his reasoning behind them is set forth at pages 54-57 of his Report. App. B, pp. 49a-53a. Briefly it was as follows:

The Referee found both that Dascoli and Zucker testified before the Inquiry that they kept the small checks and that, in fact, they had not. Since, under this theory, both had lied, the Referee correctly sought corroboration of the charge that their perjury before the Inquiry had been suborned. He stated (Report, p. 56)[2] that petitioner himself had supplied such corroboration. This asserted corroboration was petitioner's introduction into evidence of the yellow sheets which, petitioner testified, he had shown his clients. The Referee found

"the yellow sheets to have been fabricated to frustrate discovery of the truth as to where the smaller checks and their proceeds had gone * * *." (H. 57.)

The Referee said that this fabrication was "to avoid a visitation of justice for the subornation" and that this

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[2] App. B, pp. 51a-52a.

"evinced consciousness of (petitioner's) guilt of that crime." (H. 56.) The Referee said this, even though petitioner had testified before the Inquiry concerning the yellow sheets long before Dascoli and Zucker had given their allegedly perjured testimony. Thus, Zucker appeared before the Inquiry on November 14, 1958 (H. 287), whereas petitioner testified about the yellow sheets in May and June, 1958 (SR. 33).

The Referee gave four reasons for his finding that the sheets were fabricated:

(1) No sheet was used in the cross-examination by petitioner's counsel of the client to whose case it referred (Report, p. 56).

(2) The ledger entries, according to the Referee, showed that the expenses with respect to a given case had been taken from the total settlement figure or "from the top" before distribution; but the yellow sheets indicated that the expenses were taken from the clients' share and, in view of the Referee, included items not appearing in the ledger (Report, pp. 56-57).

(3) According to the Referee, there was a "more-than-coincidence" in the fact that the clients' share minus the total expenses equalled the amount of the primary check in the cases of both Dascoli and Zucker (*ibid.*), although it is not altogether clear what the Referee is saying here.

(4) It was "most singular," according to the Referee, that respondent did not buttress his testimony by producing all the yellow sheets he had ever prepared during the period in question (*ibid*).

REASONS FOR GRANTING THE WRIT.

Petitioner was permanently disbarred from the practice of his profession as a lawyer more than six years ago. He has been seeking a new hearing ever since, upon the ground that the state disciplinary proceeding against him was fundamentally unfair and denied him the protections of due process of law.

This is his second attempt to obtain relief from this Court. While it is clear that denial of certiorari carries no substantive implications,[3] and that a case once denied review here is not thereby precluded from subsequent review on the merits,[4] it is perhaps pertinent to note that, in the interim since petitioner last knocked on its door, this Court's decisions have reflected both dramatic social changes in our national scene and the shifting winds of constitutional doctrine—a movement of events and legal philosophy which make this application for relief even more compelling than the last, more than three years ago.

It is apparent that the dynamic and pressing demands of the poor, the disenfranchised, the racial minorities, for their proportionate share of the economic product of an affluent society and the fulfillment of the long-denied constitutional promise of freedom and justice and equality *in fact,* have challenged the lawyer—long a central figure in the struggle for social and legal reform[5]—to perform a

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[3] See, e.g., *Sheppard v. Ohio,* 352 U.S. 910, 911 (1956) and *Maryland v. Baltimore Radio Show,* 338 U.S. 1912 (1950).

[4] Cf. *Sheppard v. Ohio,* 352 U.S. 910, 911 (1956) (denial of certiorari); certiorari subsequently granted and decision below reversed sub nom *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *In re Willner,* 348 U.S. 955 (1955) (denial of certiorari); certiorari subsequently granted and decision below reversed sub nom *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1963).

[5] See collected case studies in Kunstler, *The Case for Courage* (Morrow, 1962).

more demanding function than history has ever before called upon him to assume. The full story of the heartbreaking efforts of lawyers in the South and riot-ridden urban centers in the North to provide effective representation of their Negro and civil rights activist clients in a hostile setting has yet to be written;[6] the dynamic growth of legal aid and public defender services for the indigent, funded by private and governmental sources, carries implications for society and the legal profession which serves it which cannot yet be fully understood.[7]

It is also apparent that, as a means of meeting the social crises which have become commonplace throughout the nation, this Court has, by its own decisions, greatly expanded and redefined the role of the lawyer as advocate in both the criminal[8] and civil[9] spheres. By placing the defense lawyer in the police interrogation room[10] and at the identification lineup in the jailhouse[11] as witness as well as counsel, by giving him weapons of discovery never before available to the defense,[12] by making his effective

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[6] See, e.g., Pollitt, *Counsel for the Unpopular Cause*, 43 N.C.L. Rev. 11 (1964).

[7] See, e.g., Brownell, *A Decade of Progress; Legal Aid and Defender Services*, 47 A.B.A.J. 867 (1961); Sparer, *The Role of the Welfare Client's Lawyer*, 12 U.C.L.A. L. Rev. 361 (1965); Clarlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. Rev. 381 (1965).

[8] E.g., *United States v. Wade*, 388 U.S. 218 (1967); *Mempa v. Rhay*, 389 U.S. 128 (1967).

[9] *United Mine Workers v. Illinois State Bar Ass'n.*, ____ U.S. ____, 88 S.Ct. 353 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *In re Gault*, 387 U.S. 1 (1967).

[10] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[11] *United States v. Wade*, 388 U.S. 218 (1967).

[12] *Dennis v. United States*, 384 U.S. 855 (1966); *Giles v. Maryland*, 386 U.S. 66 (1966).

participation in criminal [13] and juvenile [14] trials at early stages [15] and upon appeal [16] a matter of constitutional urgency, by providing effective procedures for post-conviction constitutional attack upon criminal convictions [17] and for pre-conviction constitutional attack upon state laws,[18] this Court has placed in the hands of the lawyer the means of, as well as the prime responsibility for, guarding the constitutional rights of all accused of crime by state and federal government—children as well as adults, black as well as white, the poor as well as those who can pay for legal assistance.

Moreover, this Court has apparently recognized that its opening of procedural doors heretofore closed to the individual lawyer has not only cast him in the sweeping and challenging role of principal defender of all constitutional and legal rights in our society, but has imposed vast burdens of execution upon him as well. For, in order to allow him to be both creative and effective in his newly expanded role,[19] it has loosened some of the traditional strictures against group legal practice and sanctioned his professional activity in defense of both public [20] and private [21] rights in a group setting.

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[13] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[14] *In re Gault*, 387 U.S. 1 (1967).

[15] *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963).

[16] *Douglas v. California*, 372 U.S. 353 (1963).

[17] *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963).

[18] *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

[19] See Cheatham, *The Supreme Court and the Profession of Law*, 14 Cath. U.L.R. 192, 197 (1965).

[20] *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

[21] *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Ass'n*, ---- U.S. ----, 88 S. Ct. 353 (1967).

It has been frequently observed that, in order to perform their highest function "both to society and the bar itself * * * lawyers [must] be unintimidated—free to think, speak and act as members of an Independent Bar." [22] For, "one of the great purposes underlying the grant of [the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power] was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer * * * has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people." [23]

In recognition of societal need for the independence of the bar as well as the personal tragedy to the affected lawyer, this Court has upon a number of occasions made it clear that while admissions to the bar and discipline of its members are matters of state concern, arbitrary state action which denies a lawyer permission to practice law violates the Due Process Clause of the Fourteenth Amendment.[24] But the matter does not end there. For in the cases in which this Court has reviewed state admission or

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[22] *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957).

[23] *Cohen v. Hurley*, 366 U.S. 117, 138-139 (1961) (Black, J., dissenting).

[24] *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957); *Cohen v. Hurley*, 366 U.S. 117 (1961); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963).

disbarment proceedings,[25] "[t]he issue is not * * * *whether* lawyers are entitled to due process of law * * * but, rather, *what* process is constitutionally due them in such circumstances." [26] That the answer given in each case reflects irreconcilable disagreement among the members of a gravely divided Court as to the *scope* and *quality* of due process to which lawyers are entitled is not open to serious question.[27]

The lawyer today is entitled to greater protection from the Due Process Clause of the Fourteenth Amendment than the State of New York has afforded this petitioner. For as he moves into legal fields from which he has previously been excluded, as he represents people who have never before had legal representation of any kind, as his relationship with institutions and his clients undergoes extensive metamorphosis and his professional image of himself and his duties are broadened to meet the needs of a changing society and the express command of this Court, the independent lawyer's vulnerability to arbitrary retaliation against him by the governmental and private institutions he must oppose if he is to fulfill his designated function will increase in direct proportion to his success.

The onslaught has already begun. Lawyers facing the hostility of Southern courts in trials in which race is in issue have been sharply exposed to the "hazard of being

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[25] Denial of admission to the bar and disbarment are equivalent for constitutional purposes. *Cohen v. Hurley*, 366 U.S. 117, 123 (1961).

[26] *Id.* at 129.

[27] Cf. *Schware v. Bd. of Bar Examiners*, 353 U.S. 232 (1957) and *Konigsberg v. State Bar*, 353 U.S. 252 (1957) with *In re Anastoplo*, 366 U.S. 82 (1961) and *Konigsberg v. State Bar*, 366 U.S. 36 (1961); cf. *Cohen v. Hurley*, 366 U.S. 117 (1961) with *Spevack v. Klein*, 385 U.S. 511 (1967); and see *In re Sawyer*, 360 U.S. 622 (1959); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Sacher v. Ass'n. of the Bar of the City of New York*, 347 U.S. 388 (1954); *Application of Levy*, 214 F. 2d 331 (5th Cir. 1954) rev'd per curiam 348 U.S. 978 (1955); *In re Summers*, 325 U.S. 561 (1945).

undone."[28] Contempt charges by courts,[29] disciplinary proceedings brought by local bar associations[30] and public pressure[31] have been techniques employed to neutralize effective counsel and thereby frustrate the implementation of the promise of *Brown v. Board of Education*.[32] Public Defender and Legal Aid programs have been attacked by bar associations as illegal practice of law by corporations.[33] The Office of Economic Opportunity-supported California Rural Legal Assistance program is under heavy attack by the Governor of California who charges its lawyers with "actively and unethically promoting litigation" and its organization as a "promoter of social causes"[34] and by elements in Congress who recently introduced two amendments to the federal anti-poverty bill to dilute the effectiveness of its legal program as a social force.[35]

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Petitioner during the twelve-year period of his practice of law in New York was neither a heroic nor a

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[28] It is reported that when John Lilburne was tried for treason in Cromwell's England, he asked that counsel be appointed to defend him because "no eminent experienced lawyer dare well meddle with my business, no, nor so much as bestow a visit upon me, but he runs a hazard of being undone." Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 Syracuse L. Rev. 213, 236 (1952).

[29] E.g., *Holt v. Virginia*, 381 U. S. 131 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

[30] See cases reported in Pollitt, *Counsel for the Unpopular Cause*, 43 North Carolina L. Rev. 11, 12-17 (1964).

[31] See Morgan, *A Time to Speak* (1964).

[32] 347 U.S. 483 (1954).

[33] E.g., *Azzarello v. Legal Aid Society*, 117 Ohio App. 471, 185 N.E. 2d 566 (1963).

[34] New Yorker, November 4, 1967, pp. 173-176.

[35] The amendments would have prevented any OEO-financed legal service in the country from bringing suit against a local, state or federal agency and would have required approval of the local bar association before any such legal service could begin operation. Both amendments were unsuccessful. Time, December 15, 1967, p. 75.

prestigious figure. He represented no powerful clients nor was he associated with a blue-chip law firm. He was a single practitioner, who earned his livelihood as a trial lawyer representing persons who had been injured and who sought recovery on grounds of negligence for their losses. He was paid for his services by contingent fee arrangements [36] with his clients. But for his tragic disbarment and his dogged efforts over the past six years to obtain a rehearing of the charges against him so that he might vindicate himself, his career would in all probability have remained unremarkable. But against the backdrop of two of this Court's recently decided cases, *Spevack v. Klein* [37] and *In re Gault*,[38] the personal tragedy of petitioner's disbarment presents a suitable record and a timely opportunity for this Court to serve notice upon all state bar authorities that high standards of procedural due process are constitutionally compelled in all disciplinary proceedings against lawyers,[39] to articulate clearly the *content* of such standards, and thereby provide the necessary support for a profession in flux trying to meet the needs of a society in flux.

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[36] It is of more than passing interest to note that this Court early approved of contingent fees. *Wylie v. Cox*, 20 U. S. (15 How.) 415 (1853); *Stanton v. Embry*, 93 U.S. 548 (1876); *Taylor v. Bemis*, 110 U.S. 42 (1884). Until the recent expansion of legal aid services and public defender programs, they represented the only means by which non-affluent claimants could afford to retain counsel to represent them on roughly equal terms with retained counsel of institutional defendants. See MacKinnon, *Contingent Fees in Legal Services*, 209 (1964).

[37] 385 U.S. 511 (1967).

[38] 387 U.S. 1 (1967).

[39] It is true that *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), appears to hold that procedural due process requirements are essential in state bar admission cases. But the "messy and opaque record" (See Harlan, J. dissenting, *id.* at 109) and the plurality opinions do not make clear the essential minimum content of the right of confrontation or notice in the setting of a formal disciplinary hearing. Nor are Fourth Amendment issues, urged here, raised at all.

Petitioner does not deny the state's right and duty to discipline attorneys—including himself—upon proof of professional wrongdoing. But as a precondition to such disciplinary action, it must be demonstrated that a finding of such professional wrongdoing followed a full and fair hearing at which the attorney charged had an adequate opportunity to defend himself. Such a hearing has never been given to petitioner by the State of New York.

The state court of last resort in New York has again considered the claims of constitutional infirmity in the proceedings which resulted in petitioner's permanent disbarment and has denied all of them on the merits. The vastly important question of whether the State of New York will be permitted to disbar lawyers upon the basis of such a constitutionally defective record is once again squarely presented to this Court—this time under the altered constitutional circumstances and social experience described above which juxtapose public necessity and private redress in a fashion which entitles petitioner's claims to consideration on their merits by this Court.

It is petitioner's contention that his disbarment proceeding was constitutionally defective because (I) the subpoena by which all of his business and personal records were confiscated was unconstitutionally broad; (II) the refusal of the state to return to him or allow him access to his records either during the three-year period between their seizure and his trial, or at his trial, despite timely and persistent demand therefor, unconstitutionally deprived him of the opportunity to make adequate defense; (III) the disbarment resulting from an adverse finding against him on charges never made prior to the hearing and against which he had no opportunity to defend before the ruling against him was a denial of due process of law to which he was entitled; and (IV) he neither waived nor

acquiesced in any of the constitutional violations of which he complains.

I.

PETITIONER'S RECORDS WERE SEIZED BY A GENERAL AND ROVING SEARCH IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

As a part of its general investigation of misconduct of many lawyers within its jurisdiction, the Judicial Inquiry served upon petitioner a subpoena *duces tecum* of unbelievable breadth. Pursuant to its terms, petitioner was required to surrender to agents of the State of New York all of his business records, all of his personal records, all banking records for business and personal accounts whether open or closed, all records of private investments, tax records and returns—both specified items and "any and all financial records pertaining to [his] business and/or person not itemized above" covering petitioner's activities over an unspecified period of time.[40]

Petitioner contends that the broad subpoena pursuant to which his records were produced for examination by the Judicial Inquiry was an unlawfully broad general and roving search expressly condemned by the Fourth Amendment, applicable to state proceedings through the Due Process Clause of the Fourteenth,[41] and that the evidence so acquired by the State of New York was constitutionally inadmissible in evidence against petitioner.[42]

This contention requires a determination by this Court that (A) the Fourth Amendment exclusionary rule

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[40] App. A, pp. 1a-3a.

[41] *Wolf v. Colorado*, 338 U.S. 25 (1949).

[42] *Mapp v. Ohio*, 367 U.S. 643 (1961). There is no question about the applicability of *Mapp* to the present proceeding so far as timeliness is concerned. No retroactive problem arises because *Mapp* was decided before petitioner had exhausted his appellate remedies on direct appeal. See *Linkletter v. Walker*, 381 U.S. 618 (1965).

applies to state disbarment proceedings as well as to criminal prosecutions, and (B) the breadth of the subpoena violated the Fourth Amendment requirement of particularity and reasonableness. Each of these conclusions will be considered below.

A. The Fourth Amendment exclusionary rule applies to disbarment proceedings.

There are particularly compelling reasons why lawyers are at least as entitled to Fourth Amendment protections against invasions of their privacy as are any other citizens. If state law enforcement authorities can, with constitutional impunity, rummage indiscriminately and at will through all of the private papers of lawyers, the threat or the fact[43] will necessarily diminish their verve, effectiveness, and independence in the vigorous defense of their clients' rights against those same authorities.

The traditional response that the Fourth Amendment exclusionary rule can be applied only in criminal cases will not bear analysis. The policy reasons behind the exclusionary rule require the extension of its application to *non-criminal* cases in which the government, federal or state, has had a hand in obtaining the tainted evidence which is sought to be excluded.[44]

What are the policy reasons behind the holding in *Mapp v. Ohio* that the rule of exclusion is a constitutional

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[43] *Hackin v. Arizona*, 389 U.S. 143 (1967) (dissenting opinion).

[44] Petitioner is not now urging that evidence illegally obtained by a private person is subject to the operation of the exclusionary rule, although a cogent case can be made to demonstrate the implicit undercutting of the basis of *Burdeau v. McDowell*, 256 U.S. 465 (1921), which so held, by *Elkins v. United States*, 364 U.S. 206 (1960) (tainted evidence procured by persons not restrained by the command of the Fourth Amendment but turned over to government agents who are so restrained, held: properly excluded). See dictum in *Williams v. United States*, 282 F. 2d 940, 941 (6th Cir. 1960).

command rather than a mere rule of evidence to be adopted or rejected by each sovereign state at will? It seems clear from the language of the Court in *Mapp* that there were at least three reasons, intertwined to be sure, for so holding: *First,* to demonstrate dramatically and effectively the important place occupied by the right of privacy in our constitutional scheme of freedom;[45] *Second,* to preserve to the government and the courts "that judicial integrity so necessary in the true administration of justice";[46] and *Third,* "to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."[47] Petitioner urges that all of these reasons—dramatic, moral and practical—are at least as operative in non-criminal litigation as in criminal proceedings. For, while non-criminal administrative proceedings are important, "they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers and other crimi-

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[45] "Were it otherwise, then just as without the Weeks rule [of exclusion in federal cases] the assurance against unreasonable federal searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty'" *Mapp v. Ohio,* 367 U.S. 643, 655 (1961).

[46] *Mapp v. Ohio,* 367 U.S. 643, 660 (1961) and see Mr. Justice Brandeis, dissenting in *Olmstead v. United States,* 277 U.S. 438, 485 (1928):

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example * * * If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (quoted with approval in *Mapp,* at page 659.)

[47] *Elkins v. United States,* 364 U.S. 206, 217 (1960), quoted with approval in *Mapp* at page 656.

nal elements"[48] where the exclusionary rule admittedly operates. "It would seem that the public interest in protecting privacy is equally as great in one case as in another."[49]

Boyd v. United States, 116 U.S. 616 (1886), which established the rule that use of illegally obtained evidence invalidates the entire legal proceedings in which it is used and which was the point of origin of the long history of the *Mapp* doctrine, was itself a non-criminal administrative proceeding. Moreover, the principles involving the law of search and seizure and the exclusionary rule have been applied by this Court in other cases involving administrative proceedings. Cf. *Abel v. United States,* 362 U.S. 217 (1960); *Ohio ex rel. Eaton v. Price,* 364 U.S. 263 (1960); *Frank v. Maryland,* 359 U.S. 360 (1959); *District of Columbia v. Little,* 178 F. 2d 13, *affirmed on other grounds,* 339 U.S. 1 (1950).

As Christ, *J.*, dissenting in *Sackler v. Sackler,* 229 N.Y.S. 2d 61, 65 (1962)[50] has pointed out, the exclusionary rule

> "gives new vitality to the claim for exclusion of tainted evidence in all lawsuits, civil as well as criminal. It is a strange concept which would permit a court of law to encourage the commission of illegal acts by honoring the fruits of the illegality, and which would permit the perpetrator to win a lawsuit by deliberately violating the law.

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[48] *Frank v. Maryland,* 359 U.S. 360, 374 (1959) (dissenting opinion).

[49] *Ibid.*

[50] Although respondent has attempted in the courts below to support his position that the exclusionary rule is not applicable to civil cases by citing *Sackler,* a careful reading of the holding demonstrates that it is confined to the issue of tainted evidence procured by *private persons,* an issue not raised here.

> "It would be a still greater anomaly to bar tainted evidence in a criminal case but at the same time permit its introduction in a civil suit. There is no sound reason for a different rule of admissibility between civil and criminal cases. It should be the same in both. Evidence obtained by the deliberate commission of a crime should be inadmissible on behalf of the perpetrator in the trial of a civil action." [51]

Nor is this a radical departure from history. For it must be noted that "the Fourth Amendment in origin had to do as much with ferreting out heretics and collecting taxes as with enforcement of the criminal laws." [52]

Moreover, the argument which was the essence of *Cohen v. Hurley*[53]—that constitutional standards must be relaxed in disciplinary cases against lawyers because of the overriding interest of the States in policing the conduct of the bar—is no longer available.

Several recent pronouncements by this Court support the contention that undiluted Fourth Amendment commands regarding search and seizure must be applied, not only in criminal cases, but also in disbarment hearings which are civil in form but criminal in consequence.

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[51] Or, as Judge Hopkins has stated the point:

> "It is anomalous to enforce opposite rules concerning evidence blighted by the same pollution. The unlawful search violates the identical privacy whether its fruits are used to convict in a criminal prosecution, or to forfeit a personal right in a divorce action." *Sackler v. Sackler*, 229 N.Y.S. 2d 61, 66 (1962) (dissenting opinion). See also *Lebel v. Swincicki*, 354 Mich. 427, 93 N.W. 2d 281 (1958); *Chicago v. Lord*, 3 Ill. App. 2d 410, 122 N.E. 2d 439 (1954), *affirmed* 7 Ill. 2d 379, 130 N.E. 2d 504 (1955); Cf. *Hartman v. Hartman*, 253 Wis. 389, 34 N.W. 137 (1948).

[52] *Abel v. United States*, 362 U.S. 217, 242 (1960) (dissenting opinion).

[53] 366 U.S. 117 (1961).

In *Spevack v. Klein*,[54] this Court has recently re-examined its earlier decision of *Cohen v. Hurley*,[55] in which it had held that, so far as the Fifth Amendment privilege against self-incrimination was concerned, a state in its disbarment proceedings was *not* bound to the high constitutional standards imposed upon criminal prosecutions.[56] The *Spevack* Court rejected the *Cohen* philosophy absolutely, adopted its dissenting opinions as controlling law and noted that the Fifth Amendment "extends its protections to lawyers as well as to other individuals."[57] The touchstone of the reversal of *Cohen* was that since the announcement of that decision, this Court had specifically held in *Malloy v. Hogan*[58] that the Fifth Amendment privilege against self-incrimination, as interpreted by this Court, had been absorbed in the Fourteenth as a command upon the states in their criminal prosecutions and that, as a consequence, the states were no longer free to "water down" their own self-incrimination prohibitions to exclude lawyers from the mantle of such protection.[59]

Noting that a " 'penalty' is not restricted to fine or imprisonment,"[60] this Court observed that its decision to compel strict state adherence to Fifth Amendment requirements was "in the tradition of the broad protection given the privilege at least since *Boyd v. United States*,[61] * * * where compulsory production of books and papers

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[54] 385 U.S. 511 (1967).

[55] 366 U.S. 117 (1961).

[56] *Id.* at 131.

[57] 385 U.S. 511, 513 (1967).

[58] 378 U.S. 1 (1964).

[59] 385 U.S. 511, 514-515 (1967).

[60] *Id.* at 515.

[61] 116 U.S. 616 (1886).

of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself." [62]

Spevack's reaffirmation of the availability of Fifth Amendment protections to lawyers under disciplinary attack compels the extension of Fourth Amendment guarantees to lawyers as well. For the "security of one's privacy against arbitrary [state] intrusion" guaranteed by the Fourth Amendment has long since been held to be "implicit in the concept of ordered liberty." [63] The close connection between Fourth and Fifth Amendment protections and their relationship to individual privacy and security against governmental invasion has long been an important consideration of this Court in interpreting the scope of both.[64] The Fourth and Fifth Amendments express "supplementing phases of the same constitutional purpose —to maintain inviolate large areas of personal privacy." [65] Considering the inseverability of these protections in the context of state disciplinary proceedings against lawyers, it is chilling to note in Mr. Justice Black's dissenting opinion in *Cohen v. Hurley*,[66] now the law of the land, his unerring prediction of the very facts of the instant case as a consequence of the majority's Fifth Amendment determination in that case:

> "It is, of course, possible that the majority will allow this process to go no further—that it will not disturb the few remaining constitutional safeguards of the lawyer's independence. But I find no such

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[62] 385 U.S. 511, 515 (1967).

[63] *Wolf v. Colorado*, 338 U.S. 25 (1949).

[64] *Boyd v. United States*, 116 U.S. 616 (1886); and see historical account in *Mapp v. Ohio*, 367 U.S. 643, 646-647 (1961); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

[65] *Feldman v. United States*, 322 U.S. 487, 489-490 (1944), quoted with approval in *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

[66] 366 U.S. 117, 141-143 (1961).

promise in the majority's opinion. On the contrary, I find in that opinion a willingness to give overriding effect to the lawyer's duty of 'cooperation,' even to the destruction of constitutional safeguards and I cannot know how many constitutional safeguards would be sacrificed to this doctrine. *Could a lawyer who refused to 'cooperate' now be subjected to an unlawful search in an attempt to find evidence that he is guilty of something that a judge might later find to constitute 'shady practices'?*" (Emphasis supplied.)

The case at bar represents the materialization of Mr. Justice Black's concern. Fortunately, the decision in *Spevack* demonstrates that at least a majority of this Court shares that concern. Petitioner is now impelled to ask, as this Court has itself asked in a somewhat different but analogous context:

> "This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government * * * the right not to be convicted by use of a coerced confession * * *. *Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.?*" [67] (Emphasis supplied.)

B. The broad subpoena violated the Fourth Amendment.

Assuming the applicability of the Fourth Amendment exclusionary rule to state disbarment proceedings, there remains for consideration the question of whether the broad subpoena *duces tecum* by which the State of New York acquired all of petitioner's books and records constituted an illegal search and seizure in violation of the Fourth and Fourteenth Amendments.

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[67] *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

While a great many of the cases which have delineated the law of search and seizure have been cases involving forcible physical searches by policemen, either with or without judicial warrants, it cannot at this late date be denied that compulsory production of private papers by legal process is equivalent to, and treated for constitutional purposes as, a search and seizure. *Boyd v. United States,* 116 U.S. 616 (1886); *Essgee Company of China v. United States,* 262 U.S. 151 (1923). Similar treatment is afforded such compulsory production by subpoenae *duces tecum. Essgee Company of China v. United States, supra.* And the fact that the papers whose production is thus compelled belong to an individual rather than a corporation requires the particularly unrestricted application of the protections of the Fourth and Fifth Amendments. *Essgee Company of China v. United States, supra.*

The Fourth Amendment expressly prohibits searches without warrants "*particularly describing the place to be searched,* and the *persons or things to be seized.*" This language has its roots in this country's origins. The founders were all too acutely aware of the evils of the general warrant and the writs of assistance.[68]

As a consequence of this historical development, the explicit command of the Fourth Amendment and the imperatives of a free society, this Court has frequently and resolutely set its face against general or roving searches. *Marcus v. Search Warrant,* 367 U.S. 717 (1961). See also Justice Butler's strong language in *Marron v. United States,* 275 U.S. 192, 195-196 (1927):

> "General searches have long been deemed to violate fundamental rights. It is plain that the [Fourth] Amendment forbids them * * *.

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[68] For a historical account, see *Henry v. United States,* 361 U.S. 98, 100-101 (1959) and *Harris v. United States,* 331 U.S. 145, 157-163 (1947) (dissenting opinion).

"The requirement that warrants shall particularly describe the thing to be seized makes general searches under them impossible * * *."

As a consequence of these concerns, an order for the production of records is constitutionally defective if it is too sweeping,[69] if the information sought is not relevant to any lawful inquiry,[70] or if it represents a "fishing expedition" in search of evidence of crime.[71]

In the instant case, the Judicial Inquiry used a broad subpoena *duces tecum* as a dragnet to ensnare all of petitioner's business and personal records for an indeterminate period, without regard to possible relevance to the subject of the investigation, and to sift out at its leisure the tasty and incriminating morsels of evidence it had trapped. Never has there been such a classic example of a general and roving search, nor such a pristine demonstration of the patent unfairness of such a procedure.

II.

THE STATE'S RETENTION OF PETITIONER'S RECORDS FOR THE ENTIRE THREE YEAR PERIOD PRIOR TO TRIAL AND THROUGHOUT THE TRIAL DENIED PETITIONER DUE PROCESS OF LAW.

Quite apart from the illegal search and seizure of evidence discussed in Argument I above, petitioner contends that the refusal of the prosecutory and judiciary organs of the State of New York to return petitioner's private papers to him, after timely demand, during the three-year interval between the time they were originally subpoenaed in November, 1957 and the disciplinary hearing in Decem-

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[69] *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

[70] *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946).

[71] *Fed. Trade Comm. v. American Tobacco Co.*, 264 U.S. 298, 305-306 (1924).

ber, 1960, and during the entire hearing, was a denial of due process of law under the Fourteenth Amendment which independently invalidates the proceedings below.

It is too late in the day to deny that a person charged with an act which involves either punishment or forfeiture must, as a matter of due process, have an opportunity to prepare and be heard in his own defense. *In re Oliver*, 333 U.S. 257 (1948). As a part of the preparation of a defense, the right to discover and inspect documents, even those which result from the work-product of the adverse party, is a matter of grave importance. *Roviaro v. United States*, 353 U.S. 53 (1957); *Jencks v. United States*, 353 U.S. 657 (1957).

And the right to an opportunity to prepare a defense obtains in non-criminal administrative proceedings as well as in criminal cases. *Greene v. McElroy*, 360 U.S. 474 (1959).

But a more compelling case for full disclosure than the case at bar can hardly be imagined; for here all the petitioner sought was the return of *his own private papers* so that he might prepare a defense against the charges based upon these documents. And for three years petitioner was met with consistent and arbitrary judiciary and administrative refusal to comply with this most basic and proper request. If, in response to an accusation, the right to prepare a defense has any meaning at all, this case requires reversal.

Moreover, the inaccessibility of these business records to petitioner's counsel for the three years immediately prior to petitioner's disciplinary hearing, and throughout the hearing itself, quite clearly impaired his effectiveness as counsel. A case based upon petitioner's business records in which the prosecution's star witness was an accountant making computations from, and interpretations

of, records to which the defense was denied access, in which the prosecution introduced those items of evidence which furthered its theory of the case and conveniently lost or mislaid those documents which might have exculpated the petitioner, demonstrates, without more, that the unavailability of these records emasculated defense counsel in his efforts to prepare a defense to the disciplinary charges against petitioner.

Since the *effective* assistance of counsel is fundamental to Sixth Amendment compliance, *Powell v. Alabama*, 287 U.S. 45 (1933), and such Sixth Amendment requirement is a command upon state authorities by the Due Process Clause of the Fourteenth, *Gideon v. Wainwright*, 372 U.S. 335 (1963), petitioner is entitled to relief upon this ground as well as upon general due process considerations.

Moreover, the Sixth Amendment right to *effective* confrontation of adverse witnesses, guaranteed as a matter of fundamental due process by *Pointer v. Texas*, 380 U.S. 400 (1965), and the petitioner's right "*meaningfully* to cross-examine the witness against him," *United States v. Wade*, 388 U.S. 218, 18 L. Ed. 2d 1149, 1157 (1967), *Gilbert v. California*, 388 U.S. 263 (1967), have been denied petitioner as well. How does one effectively cross-examine the prosecution's expert witness-accountant to show that he has made erroneous computations or interpretations of financial records—interpretations which are categorically denied by the accused—when neither counsel nor the accused has had access to such records for more than three years, and none of the records about which the accountant has testified are accessible to the defense in the courtroom for use during cross-examination?

There remains for consideration the question of whether the Sixth Amendment rights of effective counsel

and effective confrontation, recently held to be fundamental and essential to a fair trial and applied to state criminal proceedings through the Due Process Clause of the Fourteenth, are also obligatory in state disbarment proceedings. There is abundant authority to suggest that disbarment proceedings which do not meet these standards destroy the integrity of the fact-finding process in such a fundamental way that they cannot survive constitutional attack.

Quite apart from the necessary implications of *Spevack v. Klein*,[72] this Court has long since made it abundantly clear that in a non-criminal administrative setting, confrontation and cross-examination are clear requirements of the Fourteenth Amendment's guarantee of due process of law.[73]

It is not surprising, therefore, that in another traditional non-criminal setting—juvenile court—this Court had little difficulty in finding applicable the full panoply of rights guaranteed in state criminal prosecutions by the Fifth and Sixth Amendments, as absorbed into the Fourteenth. *In re Gault*, 387 U. S. 1 (1967). For "[t]o hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings." [74]

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[72] 385 U.S. 511 (1967). See Argument, *supra* pp. 29-31, in which petitioner urges the logical extension of *Spevack's* Fifth Amendment holding to Fourth Amendment protections. Many of the same considerations apply to his contention that *Spevack* should be extended to compel strict adherence to Sixth Amendment standards as well.

[73] *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959); *In re Oliver*, 333 U.S. 257, 273 (1948). And see *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965). Cf. *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103-104 (1963).

[74] 387 U.S. 1, 87 S. Ct. 1428, 1455 (1967).

It remains for this Court to read *Spevack v. Klein* and *In re Gault* together and hold that the Sixth Amendment rights to effective counsel, confrontation and cross-examination are applicable to state disbarment proceedings through the Due Process Clause of the Fourteenth.

III.

THE FINDING AGAINST PETITIONER ON A CHARGE OF WHICH HE WAS NEVER NOTIFIED IN ADVANCE OF HEARING AND AGAINST WHICH HE HAD NO OPPORTUNITY TO DEFEND DENIED PETITIONER DUE PROCESS OF LAW.

Lastly, petitioner contends that the finding against him for perjury—a charge which had never been presented to him in advance of the hearing, against which he never had an opportunity to interpose a defense, and of which he learned for the first time in the Report of the Special Referee after the hearing—was a denial of due process of law under the Fourteenth Amendment which independently invalidates the proceedings below.

One of the essential elements of due process of law is the right of an individual to have reasonable notice of a charge against him sufficiently in advance of trial so that he may have an opportunity to adequately prepare a defense. *In re Oliver*, 333 U.S. 257 (1948). And this principle is equally well established in non-criminal administrative proceedings. *Greene v. McElroy*, 360 U.S. 474, 497 (1959). Moreover, where the finding against the accused is that he has given false testimony before the court, such a finding in the absence of a prior charge against him which he had an opportunity to defend, is a denial of due process of law. *In re Oliver, supra.*

Nor need petitioner demonstrate prejudicial error by proving that he would not have been disbarred but for

the perjury finding without prior notice, even though a sound argument may be made on this point.[75] For where unconstitutional procedure has tainted a hearing or trial, the test of reversal is not whether there was sufficient basis to support the result, apart from the constitutionally polluted procedure, but rather, whether there is a *reasonable possibility* that the unconstitutional procedure *might have contributed* to the result. See *Fahy v. Connecticut*, 375 U.S. 85 (1963).

This broad test of reviewability is clearly met in the case at bar. A finding that petitioner had been guilty of perjury at his own disciplinary hearing might well have meant the difference between complete disbarment and less drastic disciplinary action, or none at all.

No charge of any alleged fabrication or perjury had been made in the petition initiating disbarment proceedings or in the Bill of Particulars, nor did the prosecution suggest at the trial or in the disbarment memorandum to the referee that the yellow sheets had been fabricated. In fact, the petitioner had testified about the yellow sheets at the Judicial Inquiry hearings in May and June, 1958, approximately two and a half years prior to his testimony before the Referee. The Referee himself did not suggest any fabrication until he made a finding of fabrication in his report. If petitioner had had notice that there was a question as to the yellow sheets, he could have sought and

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[75] Since the corroboration which the Referee found necessary to establish the third charge of subornation resulted from the fourth finding that petitioner committed perjury himself, it is clear that these two charges, at least, are inextricably intermingled for purposes of this petition. Inasmuch as the crucial findings of the Special Referee (Report, pp. 60-61) indicate that "I should add that if Items 1 and 2 above were alone involved I would recommend that the punishment to be imposed upon [petitioner] be a severe censure," the importance of the fourth adverse finding as affecting petitioner's disbarment is readily apparent.

introduced evidence to support their authenticity. He never had that opportunity.

Interestingly enough, it was this very issue which apparently troubled several members of the Appellate Division[76] considerably in reviewing this case.

This Court has made it clear that adequate notice and opportunity to defend are denied and due process is violated when an accused is found guilty of charges other than those presented to him in advance of trial.[77] If any doubt remained, *In re Gault*[78] disposes of the question of whether denial of timely notice of specific charges in advance of hearing on the merits offends due process:

> "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' * * * Due process of law requires [written notice to be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation]—that is, notice which would be deemed constitutionally adequate in a *civil* or criminal proceeding."[79] (Emphasis added.)

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[76] See confidential memorandum of Christ, J. *in this case*, dated October 6, 1961: "* * * a man should not be disbarred except after a hearing of the charges against him. This respondent [petitioner] is being disbarred for perjury before the Referee, but he has never been so charged with the opportunity to answer and be heard on this issue. I do not believe this should be done." See also confidential memorandum of Pette, J. to the same effect. Both these memoranda were included in the record filed with the Clerk of this Court and are here reprinted at App. C, pp. 60a-62a.

[77] *Cole v. Arkansas*, 333 U.S. 196 (1948), cited with approval in *Spevack v. Klein*, 385 U.S. 511, 518 (1967); and see *Thompson v. Louisville*, 363 U.S. 199 (1960); *DeJong v. Oregon*, 299 U.S. 353, 362 (1937).

[78] 387 U.S. 1 (1967).

[79] *Id.* at ____, 87 S. Ct. 1428, 1446-1447.

It is apparent from the record in the case at bar that petitioner never had any notice whatever of the perjury charge against him until after it was too late to do him any good—he read about it in the Referee's report and conclusions. That a charge so central to the entire disciplinary action against him and so destructive of his entire career and reputation could have been handled by an agent of the State of New York in such cavalier fashion is unthinkable in terms of the high standards of due process to which lawyers as well as other citizens are entitled.

IV.

APPELLANT HAS NEITHER WAIVED NOR ACQUIESCED IN THE VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

It is readily apparent that a valid waiver of rights or consent to search can operate only under circumstances where a conscious, volitional choice, free of duress or official pressure, may be made. *Garrity v. New Jersey*, 385 U.S. 493 (1967). To this end the courts have always been sensitive to the distinction between waiver of constitutional rights and bare submission to authority, *Johnson v. United States*, 333 U.S. 10 (1948); *Amos v. United States*, 255 U.S. 313 (1921), in their effort to "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), quoting in part from *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

For this reason a person under the compulsion of a subpoena cannot be deemed to have given consent to a search. *Nelson v. United States*, 208 F. 2d 505 (D. C. Cir. 1953), *cert. den.* 346 U.S. 827 (1953).

Quite apart from these general considerations, petitioner was placed in an impossible dilemma when he received the broad subpoena *duces tecum* of the Judicial

Inquiry. He knew that the Inquiry was investigating his alleged professional misconduct as part of its general investigatory scheme; he knew that his refusal to cooperate fully with the Judicial Inquiry by fully disclosing all information it sought, might well be grounds for disbarment or discipline for such failure to disgorge. *Re Cohen,* 199 N.Y.S. 2d 658 (1960), affirmed *Cohen v. Hurley,* 366 U.S. 117 (1961); *In re Anastaplo,* 366 U.S. 82 (1961); *Konigsberg v. State Bar of California,* 366 U. S. 36 (1961).

Recognition of the dilemma in which petitioner found himself, and reference to the many occasions in the record in which he sought to assert his constitutional right to protect the private papers which were the subject of the subpoena, lead ineluctably to the conclusion that he neither consented to the search nor waived any of his constitutional rights regarding his private papers by complying with the express and compelling language of the subpoena *duces tecum* served upon him by the Judicial Inquiry.

His vigorous resistance to the retention of his private papers as a further denial of due process and his immediate and continuing objections to the finding of guilt of an offense not charged are matters of record. Moreover, the ruling by the New York Court of Appeals on the merits of the constitutional issues presented—the ruling from which relief is sought here[80]—precludes a determination that such constitutional issues were not adequately preserved below.[81]

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[80] See order of New York Court of Appeals from which relief is sought by this petition reprinted in full at App. B, pp. 59a-60a.

[81] *See Willner v. Committee on Character & Fitness,* 373 U.S. 96, 104 (1963).

CONCLUSION.

The harshness of the penalty of disbarment has been well described by Justice Black, dissenting in *Cohen v. Hurley*, 366 U.S. 117, 146-147 (1961):

> "* * * Even apart from the financial impact, the disbarment of a lawyer cannot help but have a tremendous effect upon that lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. Such dishonor undoubtedly goes far toward destroying the reputation of the man upon whom it is heaped in the community in which he lives. And the suffering that results falls not only upon the disbarred lawyer but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the 'law of the land,' both constitutional and statutory."

When the penalties are so severe, the utmost care must be exercised to see to it that fair procedures have been employed to justify such extreme punishment.

Moreover, the record in this case provides an abundant opportunity for this Court to consider in depth the content of that due process to which lawyers are entitled and upon which they must be permitted to rely as they set about the awesome and challenging tasks this Court has assigned them in a society in flux.

Petitioner has pointed out a number of areas in which his rights as a private citizen were emasculated in the disciplinary proceedings which resulted in his permanent disbarment from the practice of law in the State of New York. The zeal of the administrative and judiciary personnel of the State of New York to protect the public against unprofessional conduct of lawyers is highly commendable. But they must, in the process, understand that:

"A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms to obtain that goal." *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957).

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD A. BERKMAN,
LARRY S. GORDON,
JOSHUA J. KANCELBAUM,
GERALD A. MESSERMAN,
Counsel for Petitioner.

EDWYN SILBERLING,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1205.

DAVID A. GOLDNER,
Petitioner,

v.

EDWARD S. SILVER,
District Attorney, Kings County, State of New York,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BERNARD A. BERKMAN,
LARRY S. GORDON,
JOSHUA J. KANCELBAUM,
GERALD A. MESSERMAN,
1320 Superior Building,
Cleveland, Ohio 44114,
Counsel for Petitioner.

EDWYN SILBERLING,
1501 Franklin Avenue,
Mineola, New York 11501,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Appendix to Petition for Writ of Certiorari.

Appendix A: Subpoena 1a

Appendix B:

Report and Recommendations of Referee 4a

Memorandum Opinion of Appellate Division ... 56a

Order of Affirmance of Court of Appeals 57a

Order of Court of Appeals Amending Remittitur 59a

Appendix C: Exhibits 60a

APPENDIX A.

BY MAIL

THE PEOPLE OF THE STATE OF NEW YORK

To:

DAVID GOLDNER
401 Broadway
New York, N. Y.

GREETING:

WE COMMAND YOU, That all business and excuses being laid aside, you appear and attend before HONORABLE GEORGE A. ARKWRIGHT, a Justice of the Supreme Court of the State of New York, at an ADDITIONAL SPECIAL TERM OF THE SUPREME COURT FOR THE COUNTY OF KINGS, at Room Number 301, 3rd floor, Borough Hall, Court and Joralemon Streets, in the Borough of Brooklyn, City and State of New York, on the 20th day of November, 1957, at 10:00 o'clock, in the forenoon, and at any adjourned date to testify and give evidence in a certain proceeding now pending in the said Court, then and there to be conducted, consisting of a Judicial Inquiry, pursuant to order of the Appellate Division of the Supreme Court of the State of New York, for the Second Department, dated January 21, 1957, as amended, with respect to all matters relative thereto, and that you bring with you, and produce at the time and place aforesaid,

1. Day Book (reflecting daily receipts)
2. Cash receipts book
3. Cash disbursements book
4. Petty cash book
5. Petty cash vouchers
6. General Ledger and General Journal
7. Cancelled checks and bank statements for personal account, regular account, special account, closed and current, check books

8. Savings Bank, Savings and Loan Association and/or any other Depository pass book, closed and current
9. Record of stock investments, U.S. Savings Bonds, mutual investment fund and/or any other similar investment
10. Payroll Records:
    (a) Payroll Book and Social Security Tax and Withholding Tax returns
11. And any and all financial records pertaining to your business and/or person not itemized above, including Federal and State income tax returns for the period January 1, 1953 to December 31, 1956,

now in your custody, and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises, and for a failure to attend you will be deemed guilty of contempt of Court, and liable to pay all damages sustained thereby and forfeit FIFTY DOLLARS in addition thereto.

WITNESS, HONORABLE GEORGE A. ARKWRIGHT, one of the Justices of said Supreme Court, presiding at the said Additional Special Term thereof, at said Borough Hall, Court and Joralemon Streets, Borough of Brooklyn, City and State of New York on the 15th day of November, 1957.

JOSEPH B. WHITTY,
Clerk.

DENIS M. HURLEY,
Counsel for the Judicial Inquiry,
Room 301, 3rd floor, Borough Hall,
Court and Joralemon Streets,
Brooklyn 1, New York.

IT IS HEREBY STIPULATED that, the above matter having been adjourned to the day of 195 , the undersigned Witness is hereby excused from attending

on said date but agrees to remain subject to the call of the Counsel for the said Judicial Inquiry.

Dated: 195 .

Witness

Counsel for the Judicial Inquiry

Endorsement pursuant to Civil Practice Act § 403-a:

The Witness is Bound by this Subpoena to appear at the hearing or examination and at any adjourned date thereof.

APPENDIX B.

(1)

SUPREME COURT

STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

REPORT AND RECOMMENDATIONS

In the Matter of the Petition of,

EDWARD S. SILVER,

Petitioner,

—against—

DAVID A. GOLDNER,

Respondent.

This proceeding was begun by service of a petition charging Respondent with various acts of professional misconduct, malpractice, fraud, deceit and conduct prejudicial to the administration of justice (Judiciary Law, Section 90). His answer is a general denial. The issues were referred to me as a Special Referee for hearing, report and recommendation. The hearing has been had and proof taken from both parties. A stenographic record of the proceedings, together with the exhibits offered and received, is submitted herewith.

At the commencement of the hearing, the taking of an oath by me as Special Referee was waived by stipulation. It was also stipulated that if it became impractical for me to make and file my report before the end of the year 1960, (when my designation as Special Referee would terminate) the submission would be deemed continued before me, despite the fact that I would then no longer be a Special Referee, and that my report might be made to this Court, in due course, in whatever official status I might then occupy.

The hearing before me was concluded December 7, 1960. The briefs of the respective parties were submitted to me in mid-January 1961. Since January 1, 1961 I have

been a Judge of the County Court, Queens County. On March 3, 1961, this Court, made an order designating me as Acting Justice of the Supreme Court, and it is in that capacity that this report is being submitted.

(2)

Respondent was admitted to the practice of the law by This Court in June 1949. About a year later he commenced his own practice in an office in New York County and has since maintained one there, although in different locations. In January, 1957, This Court ordered an investigation into the conduct of attorneys and their associates and, as one of the results of the investigation conducted by that authority, Petitioner, as District Attorney of Kings County, was directed to and did begin this proceeding. The acts of misconduct specified in the petition are alleged to have occurred between the years 1950 and 1957.

Taken seriatim, and by reference to the numbered and lettered paragraphs of the petition they are, in substance: —

7a to j:— That between the years 1950 and 1957 Respondent conspired with each of five named doctors, to cheat and defraud insurance companies, and others, through the use of false and exaggerated medical bills and reports and that he, in furtherance of the plan, referred patients to each doctor for the purpose of securing from him false and exaggerated medical bills and reports, for the purpose, and with the ultimate intent of presenting them to various companies and of inducing them to part with money in reliance thereon. Petitioner's bill of particulars more precisely alleges (Paragraph 1 [d], in substance, that the bills were to be, and in fact were, false and exaggerated in that they exaggerated the number of visits by each of the persons, also named in the bill of particulars (Paragraph [1-a]), to the respective doctors, thereby effectuating a corresponding, fraudulent increase in the amount of the medical charges for the doctor's services in the particular case.

(3)

The doctors, and the periods of their respective conspiratorial engagements with respondent, are alleged to be as follows:—

7a-b:	Louis Ray	1950 to 1957
7c-d:	Maurice Feder	1953 to 1957
7e-f:	Henry F. Gardstein	1953 to 1957
7g-h:	Jack Tendler	1953 to 1957
7i-j:	Herbert A. Cohen	1954 to 1957

At the conclusion of the hearing, Petitioner's counsel conceded that the Feder, Gardstein and Cohen conspiracies had not been established and, indeed, there is no proof that they ever existed. I THEREFORE RECOMMEND DISMISSAL of the specifications set forth in paragraphs 7c-d; 7e-f; and 7i-j of the Petition.

Nor, in my opinion, is the evidence sufficient to sustain the charges made in paragraphs 7a-b (Ray conspiracy) and 7g-h (Tendler conspiracy) and I THEREFORE RECOMMEND DISMISSAL of the specifications therein set forth. My reasons for those conclusions and recommendations follow.

Out of the medical personnel alleged to have been involved, only Doctors Ray and Tendler were called as witnesses. While their testimony, when taken with the other evidence in the case, amply justifies a conclusion that each exaggerated his medical report in one instance, neither gave testimony which would support a conclusion that respondent either counseled or procured the report to be exaggerated, or knowingly and intentionally forwarded or caused it to be forwarded to the insurer with knowledge of its fraudulent character. Respondent denied implication in those or any other instances and his guilt in any case is not made out by the other evidence.

Of the nineteen lay persons named in the bill of particulars (as having been referred to the doctors) only nine were called to testify. Of these, there were three (John Campbell, (4) Ralph Groeger and Gilbert Zucker) who gave no evidence whatever, relevant to this branch of the

case. A fourth (Stanley Gart) testified that his retained counsel (not respondent) referred him to a doctor, but went no further. A fifth (Hyman Borsack) testified that he and his wife went to a doctor (unnamed) recommended by respondent and that he (Borsack) neither received ("direct") nor ever paid a doctor's bill, but that was as far as he went. A sixth (Jack Stein), after giving some evidence in another area, invoked his privilege against self-incrimination when questioned as to whether he had spent, or told anyone he had spent, sums of money for doctor's bills. Respect for his privilege foreclosed further inquiry. Respondent's testimony revealed that Stein had been recommended to Doctor Gardstein by one of respondent's associates but, as noted at the outset, it is conceded that the alleged Gardstein conspiracy stands unproved. Of the remaining three witnesses, one, William V. Buscémi, gave testimony which, if credited, tends to connect respondent with a conspiracy involving Buscemi and Doctor Ray. The other two, Max and Martha Schmidt, gave evidence which established that Doctor Tendler had exaggerated the number of their visits to him. Concerning Buscemi, the words "if credited" are used in the fullest sense of their connotation.

He did not testify that there was any express agreement of the nature alleged in the petition and bill, nor did he circumstantially connect respondent, in the first instance, with an exaggerated report, forwarded by Doctor Ray to the insurer, in February, 1952. (*1) Both respondent Doctor Ray (5) denied any such conspiracy. The components of its evidentiary foundation are:—(1) A glaring difference between the number of visits recorded on the doctor's office cards (fourteen) (*2) and the number appearing in the report sent to the insurer (at least sixty-nine); (2) the doctor's unconvincing explanation of the discrepancy (he couldn't find his records and anyhow, they were hodge-podge); (3) Buscemi's testimony [A] that respondent sent him to Ray, for treatment; [B] that

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(*1) Petitioners Exhibit 3.

(*2) Petitioner's Exhibit 3.

in fact, he had visited Ray no more than ten times between 1951 and 1954; and [C] that when his case went to trial (April, 1955, Levine and Baker being trial counsel and respondent not participating), respondent suborned Buscemi to commit perjury as to the number of his visits to Ray and as to his loss of time and consequent loss of earnings. Thus, respondent's connection with the exaggerated report depends upon the worth of Buscemi's testimony that, on the trial, he committed perjury concerning the identical subject-matter, on the advice of respondent. In other words, the act of subornation is depended upon to justify an inference that respondent was connected with the false report, and culpably so, in the first instance. But nowhere in the case is there any evidence corroborating the word of the self-confessed perjurer and the charge of subornation cannot be maintained as a matter of law. And for the same reason, the instant charge cannot stand, since respondent is connected with the conspiracy only by this "rope of sand." The justice of the law is clearly demonstrated in this case, for Buscemi appears from the evidence to be a person who has little, if any, regard for the truth.

I am convinced that he perjured himself when he verified the bill of particulars in his action, alleging (6) that he had been confined to home and bed for some four weeks immediately after the accident and had, consequently, lost some three weeks of earnings. He admitted that he perjured himself as to that on the trial, so the falsity is not in issue. But on the hearing, while he identified his signature to the bill, he denied recollection of having read or signed it. Yet he said that he never signs papers without reading them. He holds a degree as Bachelor of Science and Pharmacy and is, or was, a practising pharmacist. He refused to admit knowledge that he was *swearing* to the content of the bill but, reluctantly, admitted an awareness that he was *representing* the content to be true. A nice distinction, but purely conceptual.

In his testimony before me he admitted, in almost the identical words, that on the trial of his cause he had

committed deliberate perjury, for the purpose of stealing money to which he knew he was not entitled. His claim that Respondent procured him to do so is met with a denial, but if the denial be insincere, it remains my opinion, on the evidence, that Buscemi's pose as a misguided innocent, perjuring himself at the trial:— "* * * only on the advice of counsel, my counsel * * *, is destroyed by evidence of earlier falsehoods, on the same plane, bespeaking a carefully conceived plan for perjury, thought out well in advance, and put into action by Buscemi himself.

The accident and injuries occurred March 31, 1951. On August 29, 1951, Buscemi was examined by Doctor Arthur A. Michele, a specialist (Orthopedic Surgery), to whom he had been referred by Doctor Ray. Doctor Michele testified at the hearing and of his credibility I have no doubt. He identified a written report of his findings, rendered to Doctor Ray on September 5, 1951. Among other things, it (*3) shows (7) that Buscemi gave his own case-history. In so doing, he stated that he had come under Doctor Ray's care the day after the accident, that X-rays were taken and injections given, and "also *micro-wave* (*4) *treatments, once weekly up to and including the present time.*" If true, that representation reflected at least twenty visits theretofore made by Buscemi to Doctor Ray. If false, it could either have been inadvertent or it could have been designed to serve

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(*3) Part of Petitioner's Exhibit 4.

(*4) Probably Doctor Michele's professional interpretation of what Buscemi told him. During the hearing, Buscemi spoke of "diathermy" and "heat" treatments.

The report discloses that the examiner found "signs suggestive of a herniated intervertebral disc and advised reexamination in six or eight weeks, as well as therapy. Another report, rendered October 16, 1951, shows that the reexamination was conducted October 15, 1951. (Part of Exhibit 4) This time, the patient said that since the last examination "he has attempted work of a limited nature" although he "has continued with his employment up to the present time." His "history and subjective complaints" were "indicative of a possible herniated intervertebral disc."

a purpose and, of course, evidence of repetition of the act has a value in that area. It was repeated.

In January of 1954 he signed an application for life insurance. Among other things, he there stated that Doctor Ray *was treating* him for a disc-injury. In his testimony before me he agreed that the reference was to the same injury, sustained in the accident, and for treatment of which he had gone to Doctor Ray. But when asked if the latter was, in fact, still treating him therefor at the time of the application, Buscemi made another nice distinction. He could not remember, so he said, whether Doctor Ray was treating him *"right at that moment of time."* If the implication (of continuity of treatment) in the application was false, Buscemi's persistence in falsehood negates the possibility of inadvertence and suggests a preconceived plan to defraud the insurer by falsehood, if possible, and by perjury, if need be. His prior consistent statements, if discovered (8) would give an insurer's counsel no material for impeachment. On the other hand, if the statement was true it, along with the prior consistent statement, casts doubt upon his testimony that he visited Doctor Ray no more than ten times in the entire course of their doctor-patient relationship. One thing more.

During Buscemi's cross-examination on the hearing, it was developed that the major theme of a part of his trial-testimony was, in substance, that from the time of the accident, right up to the time of trial, he had been and was using, continuously, a drug called Tolerol (a pain-reliever), obtainable only by prescription. Before he became fully aware of the direction of the cross-examination, he was asked how long he would say that he took the medication. He answered that he couldn't recall exactly, but "I may have taken it *for three weeks,* and when the pain subsides, you stop taking it." When the cross-examiner charged Buscemi with perjury on his own initiative, he denied present recollection as to how long he had taken the drug and fell back upon the record of the testimony

given by him at the trial:—*"If it is there, it's true."* He admitted, however, that Respondent had not spoken with him about that part of his testimony.

Petitioner places some reliance upon the fact that Respondent prepared (or was responsible for preparing), and served, a false bill of particulars in which Buscemi claimed an expense of $286.00 for medical services, etc. Respondent testified that he had no independent recollection of the matter but that, customarily, such information was obtained either from the client or the doctor. Petitioner's theory seems to be that bill enters the case on the (9) instant specification (it is elsewhere charged as a separate offense) as circumstantial evidence of respondent's connection with a scheme for exaggeration of the medical report later sent by Doctor Ray, to the insurer. But it is not shown that Respondent had anything to do with the concoction of the Ray report in the first instance, nor is it shown that Respondent knew, or should have known, that the matter set forth in the bill was false, and he denies any such knowledge. Petitioner seems tempted to conclude the contrary because, three years later, the doctor's bill was compromised for less than half the amount that would have been his due for the number of visits therein listed. But the compromise does not justify any such conclusion with respect to Respondent.

First, there was nothing before Respondent, so far as the evidence shows, which should have excited suspicion of the information given him. At the lower, average office-fee mentioned by the doctor ($3.00), the sixty-nine visits would run $207.00. There were X-rays besides and, from the reports in evidence, it appears that Buscemi had been examined twice by Doctor Michele, and once by a Doctor Smith. Counsel would, in a personal-injury case, want and have knowledge of these things, so the facts at hand were not out of line with the amount claimed in the bill. And second, the compromise took place after other counsel had taken over and respondent was entirely out of the case.

During the trial, the presiding Judge evidently detected something amiss (Buscemi was undergoing cross-examination), counsel were called up by the Judge, there was some colloquy, Leon Siken (the attorney of record) was summoned and waived his fee and the case was settled. By direction of trial counsel, Buscemi paid Respondent nothing. Buscemi's (10) testimony before me was, that after the settlement, he paid one doctor (not naming him). Doctor Ray testified that he was paid $135.00, by an insurer's check, the bill being adjusted downward because Buscemi balked at the amount. The only discrepancy is in the date of payment, which must have been April or May of 1955 since the trial was under way on April 4, 1955. Doctor Ray's record shows that Buscemi paid the bill on May 19, 1954, but as already remarked, his records were not very well kept. At any rate, since Respondent had nothing to do with the compromise of the doctor's bill, its occurrence does not betoken consciousness of falsity of the information on which the bill of particulars was prepared. Nor does it invite an inference that he was connected with any scheme to exaggerate the claim in the first instance or that he, with guilty knowledge, contrived to have the padded report sent to the insurer in the second instance. So much for the Ray conspiracy. Next to be considered is the Tendler affair.

The Schmidts and some of their relatives (Sprauer) were injured in an accident on August 1, 1952. It is not clear whether Respondent was retained directly, or whether the case was referred to him by a Leo or Leon Conrad, another attorney. Neither is it clear how Mr. and Mrs. Schmidt came to go to Doctor Tendler. At any rate, he treated them, although neither had a dependable recollection of the number of the visits. The husband said "maybe ten" but not thirty-one, and the wife said "ten times, no more," but certainly not forty-three. There was put in evidence a report written by Doctor Tendler on September 1, 1953 and thereafter forwarded to the insurer.

Tendler there certified that, between September 2, 1952 and July 1, 1953, Max Schmidt had visited him on thirty one (11) (specified) dates and Martha Schmidt on forty-three. He reflected his office-fee at five dollars per visit. There is no evidence that either of the Schmidts ever saw or even knew about this report. Neither paid the doctor's bill. According to Mrs. Schmidt, Respondent had told her that he would take care of it. Respondent testified that he did not confer with the doctor about the number of visits or the amount of his charges, that he had nothing to do with the preparation of the bills, knew nothing about their veracity and, when he received them for transmittal to the insurer, assumed them to be true. No other evidence contradicts him or suggests that he should have known that the bills were exaggerated. He testified that they were paid, by the insurer's checks, sent either to the doctor or the clients, and that he got no part of the proceeds. And again, there is no evidence to the contrary. Doctor Tendler took the stand, took an oath and then, in my opinion, flagrantly violated it.

He "vaguely" remembered having treated the Schmidts, but didn't remember the details. However, he had "a record on every patient that I have seen." But he didn't have it with him. He identified his report on the Schmidts but couldn't remember who had asked him to prepare it nor where he had sent it. Normally, though (by extraction), such things would be forwarded to the attorney, in this case, Mr. Goldner. Tendler was paid for his services to the Schmidts directly, by check, from the insurer (Allstate). He did not rebate any part of the proceeds to Respondent. The amounts received (noted in red on the rear of two, and on the face of three of the bills) represented the fair and reasonable value of his services. But it was a "reconstructed" bill.

(12)

That is to say, he, having no record of the dates of the individual visits (by the Schmidts or anyone else) would have to get them from the patients. So he couldn't tell

whether the number was excessive and he had no recollection of the matter. As just hinted in this report, Doctor Tendler was a difficult witness. He leaned on "belief" and "thought"; he evaded until he was pinned down and an answer wormed from him; he vacillated and swung like a weather-vane, sensitive to what he thought was the wind-direction yet anxious to avoid being caught in the draft. There were few things of which he was positive. One was, that he was a busy man, couldn't take time to make records and didn't have records of the actual dates of his patients' visits to the office. He made all his charges after asking the patients to supply the number of their visits and he billed them on that basis. Of course, they didn't always give specific dates. In such cases, doctor and patient would consult the calendar, the patient would indicate how many times he had visited in a given week, the doctor would pick out the dates in that week and that was how he arrived at his figures. Even in the Schmidt case, where his report was written a year after he first saw them (*5). He says his practice is a "peculiar type." Few will disagree. "I don't send bills to any of my patients. When they come in they will say 'Here is what I owe you' but I know it sounds screwy, but it just happens to be the truth." Petitioner's memorandum characterizes the testimony of this mock-witness as of "* * * strained * * * credulity, if not an outright lie." That is something of an understatement. He was a contemptuous, (13) craven perjurer. But casting out his testimony does not aid petitioner's case. The rejection of his lies does not supply evidence to the contrary of his false assertions. There is still unfilled the void that existed before he took the stand and, in all likelihood, yielded to a fear that the law would enmesh him. And well it might. That brings me to the next set of specifications, namely:—

7k to o: That Respondent recommended clients to Doctors Louis Ray (7-k), Maurice Feder (7-l), Henry F.

(*5) The Schmidts had testified and left before he took the stand.

Gardstein (7-m), Jack Tendler (7-n) and Herbert Cohen (7-o) and, in each case, agreed to and did pay the physician's fee, without reimbursement, in violation of Canon 42. In his bill of particulars, Petitioner alleges that the clients are the same as those named in the conspiracy charges (Par. 2-a); that they were referred to the doctors at or about the time of the retainer (Par. 2-b) and the sums paid the doctors are set forth in the form of grand totals for each year, from 1953 through 1956. The bill does not show what an individual doctor is alleged to have gotten in any one year, nor does it allege what sum any such doctor collected in the case of any particular client. And, the dates of respondent's alleged offenses not being alleged in the petition, it must be taken from the bill that they are claimed to have been committed in and between the years 1953 and 1957.

In my opinion these charges are not supported by the evidence. I THEREFORE RECOMMEND THE DISMISSAL of the specifications set forth in paragraphs 7-k to 7-o, both inclusive. My reasons are these.

(14)

The gist of this charge is the agreement to bear the expense, without reimbursement. Assuming, without deciding, that doctor's fees for treatment of the client's injuries are "expenses of litigation," the evidence does not show that Respondent agreed to or did pay them, without reimbursement, in any of the cases detailed by the bill of particulars. The persons whose testimony is depended upon are the same as those involved in the alleged conspiracies, and no others. But before considering their testimony, it should be remarked that evidence, independently of Respondent's testimony, confirmed a pattern of custom and usage whereby the medical bills were, in some instances, paid directly by the insurer and, in others, *through* Respondent, but not *by* him, in that he was expending trust moneys and not his own funds. Hence, evidence of a statement by him, to a client, that he would "take care" of a bill doesn't necessarily import an agreement to

bear the expense without reimbursement. Conversely, evidence of actual payment *through* him does not necessarily evidence an act in accord with such an agreement. Both of these situations are presented by the evidence.

Doctor Ray testified that Respondent referred patients to him between 1951 and 1955, but specifically denies any agreement with Respondent for the payment of his fees for services rendered the clients. After a conference off the record, his answer to the question which elicited the testimony was stricken, the question was put again and the doctor refused, on constitutional grounds (self-incrimination), to answer. (15) He later testified that he was paid for his services to such patients, but not by Respondent. The only client named by him was Buscemi who, in his testimony, said that he had no recollection of any agreement with Respondent as to which of them would pay the doctor's bill. And, as previously noted, he also testified that the insurer footed the bill. Doctor Tendler, in his appearance on the stand, testified that Respondent paid the bills of the clients referred to him. Even if I believed him—and I do not—his testimony proves nothing in this case. Respondent is faced with specific charges involving named persons. Of those persons, only the Schmidts were named by Tendler as having been referred by Respondent. And the only evidence on the issue came from Mrs. Schmidt, who testified that Respondent had assured her that he would take care of the bill. But in the light of the other evidence as to the custom and usage, taken with Tendler's acknowledgment that, in fact, he was paid by the insurer, I do not regard Respondent's assurance as an agreement to bear the expense without reimbursement. As for the other six of the nine lay witnesses called to substantiate this charge, none testified to any such agreement or payment as here alleged.

In the John Campbell matter, an accountant testified as to the state of Respondent's financial record, and no assumption of the expense was reflected there. Respondent testified that he deducted all expenses before distribution and made no agreement with Campbell to share them.

Campbell's testimony did not at all deal with this aspect of the case. The accountant also explored the matter of Ralph Groeger and found the expenses (16) charged off before the net was distributed. There was no evidence of assumption here and Respondent denied it. Likewise scrutinized by the accountant was the case of Gilbert and Gloria Zucker but here too, the expenses were charged off before distribution and Respondent so testified. In the cases of Stanley Gart, Hyman Borsack and Jack Stein, the only evidence on the subject came from Respondent and it refutes the charge. Respondent was the one who identified the doctor (Gardstein) in the Stein case and he testified, without contradiction, that Stein paid the bill himself, except for one report. Doctor Gardstein was not called. In some of these cases, items of expenses were paid *through* Respondent, but not without reimbursement. Hence, my conclusion that the charge cannot stand. The next charge is that Respondent practiced fraud upon his clients, i.e.,

7-p: That, to the detriment of his clients, Respondent, at divers times, falsely represented (to them) that he had expended various sums of money in the prosecution of their respective claims or suits and that he charged such sums, in whole or in part, to the clients, when, in truth and fact, the expenditures (claimed to have been made by him) were false and exaggerated. Petitioner's bill of particulars (Par. 3) confines the issue to five transactions which I summarize thus:—

(17)

Client	Amount allegedly claimed (and deducted)	Alleged amount of actual expenditure
Dominick Dascoli	$ 500.00	$119.50
Stanley Luckman	643.00	94.00
John Campbell	770.00	417.75
Gilbert Zucker & Gloria Zucker	1,033.00	328.80
Ralph Groeger	614.44	113.80

Petitioner's contention is, that in each case the fraud was perpetrated when respondent called the client in and distributed the proceeds of the settlement, and that the method was to issue two checks to the client's order. The larger (hereafter referred to as the "primary" check) was kept by the client, who received its proceeds. The other (to which I will refer as the "smaller" check) was handed to the client who, in reliance on respondent's representation that it was "for expenses," endorsed and returned it to respondent. The contention is, that the client never got the proceeds of the check, but that respondent did, and that the representation was known by him to be false when he made it. Baldly stated, the charge is larceny by use of a false representation to the effect that expenses in the amount of the smaller check had actually been incurred in the client's interests and had either been paid or remained to be paid.

In my opinion the evidence does not sustain the offense charged and I THEREFORE RECOMMEND DISMISSAL of the specification alleged in paragraph 7-p of the Petition as particularized by paragraph 3 of the bill of particulars. My reasons follow.

Essential to guilt of the offense are the elements of representation, falsity, knowledge, intent to deceive and defraud, deception, reliance and the obtaining of the res with (18) intent to unlawfully deprive the owner thereof and to appropriate it to the use of the taker or another. In two of these cases there is failure of proof that the representation was made. In the other three, while there is evidence of an utterance, in the vein charged, the surrounding circumstances seriously question the existence of intent to deceive and defraud, actual deception and reliance. Or, to state the proposition more bluntly, no one was deceiving anyone else and the alleged "victims" weren't victims at all. They simply wanted to hear no evil and see no evil and, consequently, they didn't hear or see any. Or at least they wouldn't admit to it on the stand.

For proof of the representation, deception and reliance, as well as the detriment, Petitioner's case rests upon

the testimony of the clients. For proof of the falsity, knowledge, intent, etc., it depends upon the testimony of an accountant who produced Respondent's records, including his ledger, and described, in some detail, his findings. The entries spanned the years 1953 to 1956, both inclusive, and had been made on a cash-basis. In his examination the accountant had noted, on his worksheets, the gross amount of the settlement in each case and the manner of its distribution. In each case two separate sums were shown as paid to the client and they corresponded, respectively, with the amounts of the primary and smaller checks. In each case, specific items of expense were found to have been entered but, when added, did not correspond with the amount allegedly represented as having been deducted for "expenses" in the Dascoli, Luckman and Campbell cases. In the Zucker and Groeger cases the amounts exceeded those alleged to have been represented, and deducted. A part of the purpose of the accountant's analysis of the records had (19) been to determine whether or not the expenses of the case had been "taken off the top" and distribution made on the basis of the balance remaining. That would show whether, according to the records, the amounts deducted for expense were in agreement with the items of actual expense, verified by examination of the ledger. In the parlance of that branch of the profession, expenses are taken "off the top" when the amount of the expense is deducted from the gross amount of the settlement and the remaining balance is divided between client and attorney in accordance with the terms (percentage) agreed upon in the retainer. Under a fifty percent retainer, as in these cases, the balance would be distributed equally. On the other hand, the expenses are said to be taken "from the client" when the gross is divided according to the percentage agreed, and the expenses are then deducted from the client's share and returned to the attorney. In order to discover the system here used, the accountant "worked backwards." That is to say, he took the amount of the primary check and multiplied it by two. Then he subtracted the end

result from the gross amount of the settlement. That was tentatively assumed to be the amount taken "off the top." That was checked by totalling the amounts shown as distributed and subtracting them from the gross. If they agreed, the expenses had been taken from the top. In these cases, with errors which will be accounted for, they agreed. The expenses had been taken from the top and the distribution figures had been computed on the basis of the balance remaining. The distribution figures showed the amounts of the smaller checks as going to the clients.

But the clients firmly denied receiving those checks or their proceeds. Yet all had been paid by Respondent's bank (Merchant's Bank of New York) and were admittedly endorsed by the payees. All originals were without any such bank-stamps (20) as would signify that they had cleared through another bank indicating, thereby, that they had been presented directly to Merchant's. Dascoli's endorsement was followed by that of a Valerie Neville, admittedly employed by Respondent at the time. The Campbell original was not available and the photostatic copy does not show the reverse side of the check but there is no dispute that it was paid. The Luckman, Zucker and Groeger endorsements were followed by the inscription "OK for cash D.A. Goldner." The Groeger check was cancelled two days after its date, the Luckman and Zucker checks five days after, and the Dascoli check six days later. So much, for the time being, for the evidence of record. Some general observations should be made as to the witnesses.

The client-attitude was not such as might be expected of the victims of fraud. No one was hostile to Respondent and some attested their original and continuing confidence in the alleged wrongdoer. Respondent categorically denied having falsely represented and deducted the expenses, as charged.

In broad outline, his testimony was that the clients received and kept the smaller checks and kept their proceeds. He denied having received any part of the proceeds, except in one collateral instance (later discussed).

In all but one of the cases he had taken the expenses from the clients, and he produced so-called "closing statements" (to which I will hereafter refer as the "yellow sheets") which, he testified, were prepared by him at or about the time of distribution and place before the client, with an explanation of the figures. The clients could, if they chose, keep them. But they didn't. As for expenses shown on the yellow sheets, but not posted in the ledger, he testified that he "worked from the files." I take that to mean (21) that he was guided by memoranda on or in the file, or bills, on which he based the content of his yellow sheet. He didn't keep the ledger himself his accountant did. Where the sum of the primary and smaller checks exceeded the amount which, by his version, would have been the client's rightful share he had, for one reason or another, increased the client's share. As to why two checks instead of one (for the total claimed to have been given the client) he had various explanations not borne out by the clients nor by external circumstances. In some cases the clients were "hungry for cash" as soon as they endorsed the insurance-company check, but until it had cleared, the Respondent's check wouldn't be good for the total amount, so he gave the smaller check for immediate use, since he had enough to cover that one. It was to avert any such complication that the primary check was sometimes dated later than the smaller one. The "OK for cash" inscription was a requirement of his bank, to facilitate cashing by clients who didn't have adequate means of personal identification. An employee would accompany the client, identify him, and the bank would give the client the cash. It was for much the same reason, he speculated, that Valerie Neville had endorsed the smaller check after Dominick Dascoli. She was employed by Respondent at the time. She had, in all probability, gone with Dascoli to identify him. But she was not called as a witness nor was her absence accounted for and that was true of various other witnesses who might have substantiated Respondent's claims. Mr. Conrad (said to have attended the distribution in cases which he had referred to respondent), was one of

them. If he also is a target of investigation that fact was not made to appear of record and is not otherwise known to me. In none of the cases was the client confronted with the yellow-sheet in aid (22) of his recollection of the events at the time of settlement and distribution. In some, they were not cross-examined with reference to the claim later made by respondent, after they had left the Court. In one (Groeger) Respondent claimed that the smaller check had been given the client in accordance with a provision of the retainer, reading: "car damage $500.00 without fee" but the retainer was not used in cross-examination of the client, who had denied recollection of having asserted any claim for property damage. (His accident-report was put in evidence to show that he had.) In that setting, the evidence in the individual cases may be more briefly stated and is thus summarized:

DASCOLI.

Dominick Dascoli:—Testified, in substance, that when the case was settled for $6,500.00 Respondent explained how it was to be divided. Dascoli received $3,000.00 (primary) check and its proceeds; Respondent said that it represented Dascoli's share and that the difference of $500.00 was for expenses. Dascoli wasn't given an itemized list of the expenses, but believed Respondent and didn't question him. He was handed the smaller check, to his order, but endorsed and returned it. He did not, and does not, know Valerie Neville, whose endorsement appears below his, nor did she endorse the check in his presence. He was happy when he got his check. He made no complaint then that he was being "short-changed" and he makes no such complaint now. He originally retained Leo Conrad but all dealings thereafter were with Respondent.

Respondent:—Testified, in substance, that he didn't tell the client the expenses were $500.00; actually, Dascoli got $3,500.00 in Conrad's presence (and implicitly, at his suggestion) (23) after Dascoli complained about the expenses and about a loss of earnings on his part. Why

two checks? To insure bank-clearance (as already outlined, ante). That was why the primary check was dated three days later than the smaller. The actual expenses were $250.00 (by reference to the yellow sheet). A bill of $100.00 for Dr. Marcus, not shown in the ledger, must have been omitted by oversight. It was deducted at the closing, but someone must have neglected to pay it.

The ledger entries show:—Settlement: $6,500.00: Distribution; to Dascoli, $3,000.00; to Conrad, $1,351.25; to Goldner, $1,648.75, which add up to $6,000.00, plus, to Dascoli, $500.00, for a total of $6,500.00. The items of expenses included $35.00 to Dr. Marcus (Dascoli's personal physician) and totalled $119.50.

The yellow sheet shows:—Fees, $3,250.00, expenses $250.00, deducted from the $3,250.00 for a balance of $3,000.00 to which is added $500.00 (with a note "adj lost salary") for a total of "$3,500—Dascoli." Among the items of expense was a $100.00 item for Dr. Marcus. No evidence of its payment was offered and Dr. Marcus was not called, though he is not named as having been connected with the alleged conspiracies of exaggeration.

It is a noteworthy circumstance that Mr. Dascoli is one of five men who assert that they accepted, without question, the meagre explanation allegedly given by Respondent for taking from them a substantial part of the proceeds of their respective settlements. I do not believe them. And when I get to the Luckman matter I will single out record-evidence which points the other way. But to return to Dascoli, his loyalty to Respondent went to the point of perjury at the Judicial Inquiry, in regard to the smaller check, and committed in response to a request, by Respondent, that Dascoli lie about the matter. (24) Mr. Dascoli recanted and told the truth when shown the checks and threatened with prosecution, and after he had phoned his wife and talked it over with her. For a person of normal sensibilities, that must have been a harrowing experience, and, according to Dascoli, Respondent was the cause. Yet, unresentful, satisfied when he got his check, still satisfied and disavowing any thought that he was

"short-changed," he remained loyal to Respondent at the hearing. Nor does it appear that he even knew Respondent until referred to him by Leo Conrad. Dascoli asserts that he was not, by his judgment, short changed. That, I believe. I conclude that if the words "for expenses" were used, they were "for the record" and nothing more, and that there was neither intention to deceive, nor deception, nor reliance upon that flimsy utterance. There was a meeting of the minds, but neither Dascoli nor respondent revealed the meeting-ground.

LUCKMAN.

Stanley Luckman: Testified, in substance, that after a settlement for $5,000.00 he took away a (primary) check for $2,178.50, but that was all he received. He endorsed and returned smaller check for $900.00 to Respondent; he didn't take it with him or receive any part of the proceeds; Respondent merely told him "there were certain expenses and that is all there was for me" and (in answer to a leading question) that he had taken the expenses "off the top." Luckman wasn't given an itemized statement and didn't ask for an explanation of the expenses. He retracted his testimony about any representation as to expenses and that they had been taken "off the top." "He just told me to do him a favor and endorse this check." Luckman didn't question why he couldn't take the smaller check with him. "At the time I was just glad the (25) case was settled and * * * happy about the whole thing." He didn't ask what Respondent was going to do with the check. He had tried, unsuccessfully, to deal with the insurer himself, before retaining Respondent, but got a "run-around." When he received his (primary) check he was satisfied with that sum. There was no question in his mind as to expenses "off the top" and he recognized that, *whatever it was for*, it was a legitimate disbursement, to the best of his knowledge (he added).

Respondent: Denied falsely deducting expenses of $643.00 etc., and denied that the expenses were only $94.00. He testified, in substance, that, by reference to his

yellow sheet, they were $321.50. Luckman actually got $3,078.00, through both checks, because he complained about his share. Two checks were issued because Luckman didn't want his wife to know (presumably, the amount he was really getting. "He had been seeing some girl.") He denied that he had asked Luckman to endorse and return the smaller check, as an accommodation. "* * * Mr. Luckman was a business man." The smaller check was Okayed for cash to facilitate cashing by the payee (same procedure as Dascoli).

The ledger-entries show: Settlement, $5,000.00: Distribution; to Luckman, $2,178.50; to Goldner, $1,921.50, which add up to $4,100.00 plus, to Luckman, $900.00, for a total of $5,000.00. The ledger-entries of items of expense might have covered two companion-cases and totalled $140.75, not broken down by the accountant.

The yellow-sheet shows:—expenses of $321.50, taken from the client's share. They include a total of $270.00 for enumerated items of medical expense. As to why his ledger showed only $35.00 to one of the doctors (Pomerantz) listed for $40.00 in the sheet, Respondent said that he had the bill before him when (26) he made the deductions and couldn't explain why he was paid less. As to the other doctors, not shown in the ledger, he was working from his files and knew they were paid. No receipted bills nor cancelled checks were offered and none of the doctors was called.

I have no doubt that Mr. Luckman was "happy about the whole thing"—after the amount of his primary check had been negotiated to his own satisfaction. But the record-evidence destroys the atmosphere of implicit trust and unquestioning confidence created by his testimony. Going back to the settlement figures, it is apparent that nine hundred dollars had been taken from the top and the remainder of $4,100.00 had been distributed, unequally. Luckman's share was $257.00 more than Goldner's and, of course, there must have been a reason. Upon the figures, one of two things happened. Either Luckman insisted upon another $128.50 and Goldner yielded the point, or

Luckman made a bid for $257.00 and his claim was compromised by splitting the figure down the middle. If the first of these things happened, a sum of $128.50 would have been added to half the balance being distributed and would have been given to Luckman. The result would be $2,050.00 plus $128.50 or a total of $2,178.50, which is what Mr. Luckman got. To Goldner, the result would be $2,050.00 less $128.50, for a remainder of $1,921.50, which is what Respondent got. And, if the second thing happened, the figures would shape up the same way. "Mr. Luckman was a business man." That, I accept. I reject his assertion that he did not question the expenses, if the words "certain expenses * * * off the top" were used at all. I reject his testimony that he just did Respondent a favor and turned back the smaller check without any question as to why he couldn't have it for himself. I accept his acknowledgement that it was for a disbursement (not necessarily legitimate) and reject his implication that he did not actually know what it was for. I conclude that he just didn't disclose the extent of his knowledge at the hearing. And neither did (27) the Respondent. It follows that there was neither intended deception, actual deception, nor reliance.

CAMPBELL.

John Campbell:—Testified, in substance, that after a settlement for $7,000, he received and deposited the primary check, but never received proceeds of smaller ($700.00) check which he endorsed and returned to Respondent. His testimony is more fully discussed after comment on the yellow-sheet.

Respondent:—Denied having represented or deducted $700.00 as expenses; he testified, in substance, that he didn't receive any part of proceeds of smaller check; it was issued because a girl mistakenly informed Campbell, by phone, that the case was settled for $8,000.00 and, when the client learned the correct amount he was disappointed. He complained that Goldner was winding up with a net fifty percent while he (Campbell) had lost $500.00 in car

damage, in addition to loss of income (moonlighting fireman) so seven hundred dollars was added to his share, and that is what the smaller check was for. After Campbell had been to the Judicial Inquiry for the first time, he told Respondent that the latter had charged him for doctors he (Campbell) didn't remember seeing. Respondent explained that the doctors had reviewed his X-rays. "He wasn't a fellow to part with any money without knowing about it."

The ledger-entries show:—Settlement: $7,000.00: Distribution; to Campbell $3,115.00; to Goldner, $3,115.00, which add up to $6,230.00 plus, to Campbell, $700.00, for a total of $6,930.00, leaving $70.00 unaccounted for.

The yellow-sheet shows:—expenses of $385.00, taken from the client's share.

Mr. Campbell was intelligent, alert on the stand, brief (not quite four pages), to the point and chose his words with care. (28) He was not cross-examined as to his principal or supplementary occupation, nor as to the sequel to his appearance at the Judicial Inquiry. Although, on first impression, his testimony suggests ignorance of the purpose of the "expenses" for which $700.00 was taken from him, it is consistent with knowledge of a specific purpose by a witness careful not to betray the fact unless forced to. With an alleged "ten percenter" figuring in the other charges in the specifications, the circumstance that the alleged "expenses" of $700.00 are exactly ten percent of the amount of the Campbell settlement has some significance in its setting. Now note Mr. Campbell's testimony. He wasn't "exactly" given an explanation or written statement as to how the amount of his (primary) check was computed. *As far as he knew,* it was for expenses. That is what he was told (in answer to a leading question). But if Mr. Campbell meant to convey the understanding that he was in ignorance of the reason why a substantial sum of money was taken from him, and that he let it go on the strength of a casual representation that it was "for expenses" I do not believe him. If the words "for expenses" were used, I do not believe that he was intended

to be or that he was deceived thereby, nor that he relied on so skimpy an explanation.

He had been referred to Respondent, said Mr. Campbell, by a man down at the collision shop, so it was a first meeting and there was no past relationship, professional, or social, on which blind faith and confidence in the attorney might have rested. Seven hundred dollars is a lot of money in the lives of most of us and there is nothing to show that Mr. Campbell is more fortunate—or less prudent—than the rest of us. And a man of his intelligence and forethought, as evidenced on the stand, with a normal, prudent regard for his own interests, would ask for a more adequate explanation of the reason why he was parting with one-tenth of his settlement, especially if, as Respondent testified, Campbell found it economically necessary or advantageous to pursue two gainful occupations. But if (29) Respondent told an untruth it remains my opinion that Mr. Campbell did not tell the whole truth which, of course, is much the same thing. I reject the suggestion of his testimony that he was in ignorance of and deceived concerning the purpose of the payment.

And I reject Respondent's explanation of the payment.

ZUCKER.

Gilbert Zucker: (Gloria was his wife) Testified, in substance, that when the case was settled for $7,000.00 he received and got the proceeds of the $2,983.50 (primary) check but the smaller ($1,000.00) check he endorsed and returned to Respondent; he didn't receive its proceeds. He believed the computation was explained, but recalled no written statement. As to the primary check he "believed" the explanation was "this is the proceeds as a result of the case being settled * * *, words to this effect." and, as to the smaller check and why he had to endorse it over, "Well, something to the effect about bookkeeping. *I really wasn't interested at the time* * * *," He went on to admit perjury at the Judicial Inquiry, allegedly committed by Respondent's procurement.

Respondent:—Denied having falsely deducted expenses of $1,033.00 etc., and denied falsely representing

the matter; the substance of his testimony was, that the actual expenses (with reference to the yellow sheet) were $516.50, since discovered to have been erroneous through duplication of an item of $190.00 for Dr. Feder; Zucker did not return the smaller check and Respondent got no part of its proceeds. It was given to increase the Zucker share because Gilbert Zucker was a nephew of Sam Missler, who referred cases to Conrad, and Conrad (the attorney originally retained) agreed that the Zuckers would get an additional $1,000.00. Why two checks? He couldn't recall, but the talk about Missler (and some murmuring about the expenses) may have occurred after the primary check had been issued.

(30)

The ledger entries show:—Settlement $7,000.00: Distribution; to Zuckers, $2,983.50; to Conrad, $1,491.75; to Goldner, $614.75 plus, to Zucker, $1,000.00 for a total of $6,090.00. But in this case the figures show that *$1,033.00* had been taken from the top, leaving a balance of $5,967.00 for distribution. The Zucker (primary) check is fifty percent and the Conrad check is twenty-five percent of that amount. The ledger entries itemize expenses, totalling $1,033.00, as follows:—*Citroen* (the alleged "ten-percenter") *$700.00;* Dr. Cohen, $20.00; Dr. Feder, $190.00 and Goldner, miscellaneous, $123.00 Therefore, on the basis of the ledger entries, the computation must be made like this:—Settlement, $7,000.00, less $1,033.00 (expenses, actual) leaves a remainder of $5,967.00 distributed:—to Zuckers, $2,983.50; to Conrad, $1,491.75, which add up to $4,475.25 plus, to Zucker, $1,000.00 for a sub-total of $5,475.25, plus (all that was left), to Goldner, $491.75 for a total of $5,967.00. The amount of the difference between the fee booked by Respondent—$614.75—and the remainder left for him to get—$491.75—is $123.00, which is the exact amount of his miscellaneous expenses.

The yellow sheet shows:—expenses of $516.50, deducted from $3,500.00, with a remainder of $2,983.50, under which is the figure 1,000—with a note: "Clients Leo asked favor." No sum is earmarked for Citroen among those listed as items of expense.

This case brings to the forefront *one* reason for a conspiracy of silence which might well extend to and include the others. There is no evidence of any false representation as to expense. The testimony goes "* * * this is the proceeds * * * something to the effect about bookkeeping * * *." The detached disinterest in the ultimate disposition of a thousand dollars;—"really wasn't interested at the time," is completely incredible. And the expenses of record were in excess of the $1,000.00 which Respondent is, in effect, charged with having stolen by the use of the false pretense that wasn't made. Among the expenses was an item of $700.00—ten percent (31) of the settlement—for Citroen. I do not believe that Mr. Zucker's knowledge of the bookkeeping was so limited as he stated in his testimony.

As for the respondent, his testimony is rejected. A blueprint is hardly necessary.

GROEGER.

Ralph Groeger:—Testified, in substance, that after a settlement for $5,000.00 he received a primary check for $2,193.00 and got the proceeds, but didn't get the proceeds of a smaller check for $500.00 which he endorsed and returned to Respondent. He "thought" Respondent wrote down an explanation and showed it to him. Although he was unable to recall the fact, his accident report (in evidence) claimed property damage of $500.00 and pictures (also in evidence) show extensive damage to the front end of his car.

Respondent:—Testified, in substance, that the client got a total of $2,698.00 by the primary and smaller checks. A notation on the retainer (of Leo Conrad) in the words: "car damage $500.00 without fee," led him to assume that the smaller check was given in accordance with that provision. And, because the smaller check was dated five days (actually, six) before the larger, he must have issued it because the client wanted money right away.

The ledger entries show:—Settlement, $5,000.00: Distribution; to Groeger, $2,193.00; to Conrad, $1,096.50 and

to Goldner, $710.50, which add up to $4,000.00, plus, to Groeger, $500.00, for a total of $4,500.00. But here again, a deduction of $614.00 must have been made from the top to arrive at a distributable balance of $4,386.00. Restoring and adding that amount would give a gross of $5,114.00. The error is acounted for by reference to the items of expense entered in the ledger. They are, Citroen (the alleged ten-percenter again) $500.00 and Goldner miscellaneous, $114.00. The amount of the excess is also the amount of Goldner's miscellaneous expenses. These were verified by the accountant as, actually, $113.80, in connection with which, note the content of

(32)

The yellow sheet: which shows itemized expenses of $113.80, not including nor reflecting any payment to Citroen. To the amount of $113.80 is added "car damage 500—" for a sum of $613.80, which is deducted from 5000—with a remainder of $4,386.20, which is divided by two. The notation continues like this:—

" 2198.10)
Car damage 500—) Groeger"

This is the only one of the five cases in which Respondent took the expenses from the top.

Aside from the obvious fact that the amount of the expenses exceeded the amount of the smaller check in this case, as in the preceding one, there is no evidence whatever of false representation as to expenses. The very first reference to the subject was made by Mr. Groeger when asked the terms of the retainer. He answered "fifty percent less expenses." He was then asked whether, when he received the primary check, he requested Respondent to "explain what the expenses were." His answer: "I don't think I asked him; I think he explained it to me." Asked whether verbally or in writing, he answered: "I think he wrote it down and showed it to me, but I don't recall it exactly." That was the entire testimony on the subject, (33) and, of course, it does not make out a false pretense. I reject Respondent's testimony, and his yellow sheet, as untrue. The yellow sheet in evidence was not identified

by Groeger as the one shown him. He was not asked about it on cross-examination.

SUMMARY COMMENT.

It must be evident, at this point, that I am convinced, by the evidence, that Respondent received the proceeds of these smaller checks, but not for his own use, and that the clients were aware of the purpose for which the money was to be spent. The word "bribe" was not used in cross-examining Respondent. He was asked about—but denied—the giving of gratuities in another connection. With specific reference to the smaller checks, the cross-examiner suggested—but Respondent denied—payments to Insurance Company adjusters or employees, in general. "Gratuities" is a polite word, "bribery" an ugly one. There is no evidence of the actual occurrence of either, but the image of Respondent, created by the evidence, is not that of an avaricious man. It is, rather, that of one who spent the clients' money for results. And the clients were grateful for the results and not at all disposed to question that there were obligations to be met.

(34)

BORSACK, GART, GRANAT, and SCHMIDT.

Over the objection of Respondent's counsel, evidence of these transactions was received at the hearing. None of them is included in the charge of larceny by false pretense as narrowed in scope (to the five cases just discussed) by the bill of particulars. The evidence was received on the theory that evidence of similar acts is admitted as an exception to the general rule of exclusion when it has true probative value on a present issue, either of (1) the intent with which the act presently under consideration was done or, (2) whether the act was done in pursuance of a single, sustained and continuing scheme and plan. But to serve that purpose they must, of course, have a criminal complexion. Otherwise, they are not other "criminal acts" and contribute nothing to the proof. After reviewing the hearing-record, I am convinced that the other transactions are not themselves shown to have involved criminal con-

duct, and hence have no value as evidence. Consequently, they bring to the case only the impact of prejudice by suggestion, unproved. Were this a matter in which I had the power of determination, I would strike them from the record. But since my only function now remaining is report and recommendation, the evidence must remain in the record for review by the Court to which this report is rendered and my recommendations made.

For such aid as it may lend in the process of review, the evidence in each of these cases is tersely summarized. Here again, a note of factors and considerations (35) common to all will aid perspective and shorten my address. The accountant's testimony does not cover any of these cases. As a result, there is no evidence of the falsity of Respondent's representation in any case, if he made one and if it was false. Respondent's yellow sheets are in substantial accord with his version of these matters and, as in the others, I reject his versions and his yellow sheets.

Hyman Borsack:—(Case also covered wife, Ann) Testified, in substance, that the case was settled for $5,500.00. Here two primary checks were issued and the proceeds received by clients. The smaller check for $600.00 was endorsed and returned to Respondent. The client didn't get the proceeds. As for the conversation concerning it:—"Well, he said it was for expenses." Another unperturbed and acquiescent victim.

Respondent:—Testified, in substance, that the client got and kept the smaller check, and he got no part of the proceeds.

The yellow sheet:—shows expenses of $154.00 taken from share of Ann Cohen (Borsack) on a claim settled for $1,000.00, with remainder of $346.00, apparently rounded out to $350.00, but her primary check (in evidence) was for $390.00; expenses of $299.00 taken from share of Hyman Borsack (settled for $4,500.00) with remainder of $1,951.00 and note "600—extra to HB." Hyman's primary check was for $1,951.00.

Stanley Gart:—Testified, in substance, that he retained Conrad but Respondent handled the matter; it was

settled for $2,000.00 (actually, $1,995.00, per my examination of the ledger). He received the primary check of $829.60, (36) and its proceeds, but didn't remember a smaller check for $200.00, although he identified his signature (endorsement) and he didn't get the proceeds. He denied having received the smaller check as a result of a complaint by him, that the amount of the primary check wasn't adequate in view of his (Gart's) loss of earnings.

Respondent:—Testified, in substance, that he received no part of proceeds of smaller check; it was given to Gart because he had had to wear a jaw-brace and had lost earnings; the different dates meant that there wasn't enough on deposit to cover both checks, etc.

The yellow sheet:—Shows settlement, $1,995.00; client's share $997.50, from which deducted expenses of $167.90; to remainder of $829.60 is added 200—with notation "To cover part loss earnings" after which total of $1,029.60 is struck. Mr. Gart either had a poor recollection or was a reluctant witness.

Ned Granat:—Testified, in substance, that he didn't remember the settlement-figure. His brother-in-law, Lewis Bernstein, who forwarded the case to Respondent, supplied it as $1,750.00. Granat testified that he received the primary check of $800.00 and its proceeds, but that after he endorsed the smaller check for $200.00, someone in the office took it back. He didn't get the cash. He admitted that he owed Bernstein some money but denied telling Respondent to turn the $200.00 over to Bernstein in payment of the debt. "The thing that I heard was it was additional expenses." He testified that Respondent asked him to lie about getting (37) the proceeds, at the Judicial Inquiry. The record shows that he perjured himself in the matter, but recanted. He was of sub-normal intelligence, a reluctant witness and of poor memory. He didn't remember the substance of his Judicial Inquiry testimony though he had read it a week before the hearing.

Respondent:—Testified, in substance, that Granat (as a result of suggestion by Goldner) said to turn the $200

cash over in payment of the Bernstein debt, and that he did turn it over, as authorized.

Lewis G. Bernstein:—Testified, in substance, that he forwarded the case to Respondent; there was a debt and he mentioned it to Respondent when he sent the case along; after the settlement, Respondent did give him some cash with a remark indicating that it was against the debt (he also got a forwarding fee) but he wasn't sure of the amount. It might have been one or two hundred dollars.

The yellow sheet:—showed only expenses of $153.00, but not the alleged manner of distribution. Bernstein was interested in Granat through relationship, by affinity, and in Respondent, through profitable business (professional) dealings with him.

Max Schmidt:—(Case also involved wife, Martha.) Neither the Schmidts nor Respondent could recall the amount of the settlement. Mr. Schmidt's examination was conducted with proof of exaggeration of Tendler's medical report as the chief aim. When asked how much he got in settlement Mr. Schmidt, with pass-book in hand, said $970.00. But the primary check (38) was for $870.00. Asked whether he deposited "that check" Schmidt answered:—"I didn't have a check. Cash money." He identified his signature (endorsement) on the primary check. Asked whether he got $870.00 for it, he said: "I only got that money what I deposit in the bank. * * * $970.00. That is all what I remember." He also identified his signature (endorsement) on the smaller check for $680.00 but couldn't remember the conversation when he got it. As to whether he remembered receiving its proceeds:—"altogether what I could tell you here was $970.00 in cash money." And he too, was satisfied with the settlement.

Respondent:—Testified, in substance, that he couldn't recall the amount of the settlement, but the clients got both checks. He didn't get the proceeds of the smaller check: "Never had the money—never touched it."

No yellow sheet was offered in this case.

The next specification advances the second wave of the attack on the primary and smaller check device. It is thus alleged, in substance:

7-q:—That respondent, for the purpose of deceiving Federal and New York State Income Tax Authorities, at various times issued two settlement checks to each of his clients in payment of the latter's share of proceeds of litigation, or claims, but demanded and received from each such client the proceeds of one of such checks without declaring it as taxable income. Petitioner's bill of particulars specifies that the checks were issued at the time of settlement, that the proceeds were received by respondent, personally, (39) and through Valerie Neville Mangino, at his office or bank and (implicitly) that he failed to declare the money, so received, as taxable income for the year 1954, for which he declared a gross income of $54,821.78 but paid taxes on a (declared) net income of $1,793.71. (Par. 4-b, c, d.)

Respondent's counsel protests the consideration of this charge upon the ground that, prior to the taking of testimony at the hearing, there was a stipulation made between him and counsel for Petitioner, that the latter would be bound by the bill of particulars and that the income tax charge would be no part of the proof in this case. (Petitioner's Memo, page 21.) There is no such stipulation of record. There is colloquy about a representation made by the Petitioner's counsel, to that effect. It occurred on the objection of Respondent's counsel to the admission of the accountant's testimony as to the Zucker transaction, wherein the settlement and distribution occurred (by reference to the checks) March 19, 1954. Mr. Markowitz stated, in effect, that the proof was offered to illuminate the matter of the two checks and, on later objection, agreed that he had made a representation of the kind just noted. He then stated that the purpose of the proof was to show the manipulation of the books. Looking back upon it, the stipulation, if in the terms employed by counsel, would be pointless, since the Petitioner's bill of particulars, as above summarized, charges the offense as

having been committed in 1954 when, presumably, Respondent (40) got his fee in the Zucker case. So the proof was admissible under the bill. However that may be, the ultimate reality is, that there is no evidence whatever to support the charge. The income, as alleged in the bill, is not proved. The declarations (Federal and State) alleged in the bill are not proved. The evidence is insufficient to sustain the charge in any event.

I THEREFORE RECOMMEND DISMISSAL of the specifications alleged in this paragraph of the petition.

The next specification has to do with another phase of the conspiracy of exaggeration. In substance, the allegation is,

7-r: That Respondent, in various actions instituted by him as attorney for the respective plaintiffs, prepared and submitted, or permitted preparation and submission of bills of particulars containing false and exaggerated statements which he knew—or, with the exercise of reasonable diligence, should have known—were false and exaggerated, and thereby attempted to and did perpetrate fraud and deceit upon the respective courts, defendants and insurers. Five such actions are specified in the bill of particulars (Par. 5):—

(41)

TITLE	COURT	INSURER
Bernard Rickles v. Nicholas De Fillipo	Supreme, Bronx Co.	Allstate Insurance Co.
Jack Stein v. Charles Goldberg	Supreme, Queens Co.	Employer's Group
Bernard Stoller v. John Rushetsky	Supreme, Kings Co.	Empire Mutual
Dodell v. Jerry Fessler	Supreme, Kings Co.	Hartford Accident & Indemnity
William V. Buscemi v. Nassau Air Conditioning Co.	Supreme, Kings Co.	Aetna Casualty & Surety

(42)

In my opinion this charge is not sustained by the evidence. I THEREFORE RECOMMEND ITS DISMISSAL. My reasons are these:

No evidence at all was offered, or elicited from Respondent, with reference to the bills in the *Rickles, Stoller* and *Rushetsky* cases. In the *Stein* and *Buscemi* cases the nature of the falsity contended for by Petitioner has to be taken from the tenor of the examination of the witness, since it is not specified in the bill of particulars.

In *Stein v. Goldberg,* attention was focussed on the plaintiff's claims for loss of time following the accident (one month, and intermittently thereafter) and for medical services and supplies (approximately $265.00). (*6) As previously noted, Stein took refuge behind his Constitutional privilege. His first refusal was evoked by questioning as to his loss of time from business as a result of injuries sustained in the accident. Given time to consult with his attorney, he resumed the stand and testified that he couldn't do his job in full; he lost some time; he didn't think it was a month; he "stood away a couple of days" and the rest of the time went in and did part-time work; he stayed there a little while and went back home. He didn't remember whether he *told* anyone he was disabled for approximately a month following the accident, didn't recall *discussing* his disability, with Respondent, for the purpose of drawing up a bill of particulars, nor did he remember discussing, with him, how much he had paid in doctor's bills. As to whether he had *spent* any money for medical bills he again invoked his privilege and, on the same ground, refused to answer whether he had ever *told* anybody that he had spent $265.00 for physicians' services and medical supplies. Shown a copy of the bill, he professed inability to recall having seen it before. On his part, Respondent denied knowledge of exaggeration, if any such thing had happened.

(*6) Pet ex 24, Par. 5 p. 3, verified by Respondent.

(43)

He testified that the information as to the injury itself had been obtained from a report (in his file) rendered by a Doctor Leo Green, to whom Stein had been referred by Doctor Gardstein. The information as to the loss of time was obtained from the client and the information as to the medical expenses, from bills rendered by the treating physician (Gardstein), Doctor Green and others, including X-Rays, and pretty much coming out to the amount claimed in the bill (handed to Mr. DiBiasi). Except that Respondent paid Doctor Gardstein for a report, Stein himself paid the latter's bill. In short, the information was obtained either from the client or the doctors, and there is no evidence to show that Respondent knew, or should have known, that the information on which he relied in preparing the bill was false.

In *Buscemi v. Nassau* etc., the plaintiff's bill of particulars claimed a total of $496.00 for medical service and supply, of which, $286.00 was for services. It also made a claim for four weeks loss of time (confined to home and bed) immediately after the accident, and a day or two at various intermittent times "since then," resulting in a loss of earnings for three weeks. (*7) Buscemi's testimony, and his talents, have previously been dealt with at length and ned not be reviewed again here. The gist of Respondent's testimony was that the information was obtained either from the client, the employer or the doctor and there is no evidence to show that he knew, or should have known, that the information, incorporated into the bill, was false.

By the next specification, it is alleged, in substance:—

7-s: That Respondent conspired and arranged with various persons to solicit, and to procure through solicitation—directly and indirectly—, legal work and retainers authorizing him to render legal services, in violation of the

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(*7) Pet Ex 1, p. 2, par 5; Id., pp. 3, 4, pars. 6, 7.

provisions (44) of Section 270-a of the Penal Law and (the precepts of) Canon 28. The specification is couched in the terms of the Penal Law section. By his bill of particulars (Par. 6-a) Petitioner names Sam Gabrielle and Michael W. Castoro, an Allstate adjuster, as the co-conspirators and alleges (Par. 6-b) that they, respectively, solicited John Campbell (Gabrielle), Helen Thompson, Harry Ketcham and Hazel Cohen (Castoro) to retain Respondent.

In my opinion, the evidence does not support this charge, and I THEREFORE RECOMMEND ITS DISMISSAL. My reasons are these:

The essence of the offense is solicitation or procurement, personally, or through another, acting as agent. The agency-provision accords with the fundamental law of conspiracy, but which, the actor alone is answerable for his acts unless he has been incited thereto (counselled, commanded, induced or procured) by the accused. In other words, there can be no conspiratorial arrangement, as alleged in the petition, unless there has been a combination in an agreement to do the unlawful act. The agreement can, and most often must, be established circumstantially, but the knowledge of the accused and his concurrence in the criminal purpose must be shown or the accusation will fail. Here again, evidence of similar transactions, when available, will have a value on the issues of knowledge and concurrence. But the difficulty with this case is, that there is evidence of but one case of *solicitation*, as distinguished from bare referral, and no evidence that the Respondent had any connection with the *solicitation*. That is the Ketcham case

Mr. Harry Ketcham testified that, after an accident on November 24, 1954, he reported the matter to his insurer, Allstate. By appointment, he was visited at the Navy-Yard by Michael Castoro, an Allstate adjuster. Ketcham and his two passenegrs, Tony Fuschetto and John Marzano, were interviewed by Castoro who, after getting the facts, asked whether they had an (45) attorney.

They told him they did not. He then asked whether they were interested in an attorney and, when they answered in the affirmative, he gave them Respondent's name, address and telephone number. They, by appointment, went to see Respondent who accepted Fuschetto and Marzano as clients but told Ketcham he would have to get another lawyer, since he was the driver and the passengers could sue him. Ketcham eventually went to Leo Conrad. He doubted that Respondent sent him there. There is no dispute that Castoro was, at the time, a duly licensed New York attorney but, it should be added, attorneys are not exempt from the law of solicitation. Contrariwise, they are its prime target.

Respondent testified that Ketcham, Fuschetto and Marzano had been referred to him by Castoro. There is no evidence that he had any knowledge of the act of solicitation in this or in any other case. Indeed, there is no evidence of solicitation *in* any other case. All that appears is, as admitted by Respondent—who alone supplied the evidence—that Helen Thompson and Hazel Cohen, the other two persons named in Petitioner's bill, had been *referred* to him by Castoro. They were not called as witnesses. There is no proof that they were solicited. Respondent, under cross-examination, testified that he had known Castoro since about 1953 or 1954 but couldn't recall how the acquaintance came about. From then, until the time of the hearing, he wasn't sure how many cases Castoro had referred to him, but it was probably under a dozen. His contention was that Castoro worked on the cases with him and was paid, as would be any other attorney who shared the work and the responsibility. But, he continued, he never sued a defendant covered by Allstate, in any case referred to him by Castoro. In one of the cases, Castoro had referred his own client to Respondent. The client, in turn (he couldn't remember the name) recommended a Jennie Pagano and one Corbino to Respondent. They were considered as referred to Respondent, by Castoro, to avoid (46) suspicion of client-

stealing. The evidence of the other transactions, as elicited from the Respondent, gives no aid to Petitioner's case. It may be that Castoro solicited all whom he referred to Respondent, but if so, there is no proof of it. Only suspicion. The other case specified in the bill of particulars is that of John Campbell, who also figured in the false-representation charges.

On this phase of the case Mr. Campbell testified that, after the accident, he went to a collision shop, where he had a friend, and "they gave me Mr. Goldner's name." Whether Campbell asked his friend about a lawyer, or whether the information was volunteered, and if so, under what circumstances, was not made to appear.

The next two specifications were abandoned by Petitioner at the conclusion of the hearing. The substance of the intendment of the allegations of each is, respectively:—

> 7-t:—That respondent, in pretended obedience to special Rule 4-A of the Appellate Division, First Department, filed with that Court falsified statements of retainer in personal-injury actions, in actual violation of that rule, and otherwise attempted to defraud and mislead the said Court by such filing, and,
>
> 7-u:—That Respondent, in violation of the provisions of Special Rule 4-A of the Appellate Division, First Department, failed to file with the said Court statements of retainer in matters in which he was retained.

There is, concededly, no evidence to support these charges. I THEREFORE RECOMMEND THEIR DISMISSAL.

(47)

It is next alleged, in substance:

> 7-v:—That, in violation of Special Rule 4-B of the Appellate Division, First Department, Respondent failed to provide clients with statements relative to the settlement and disposition of their cases. The bill of particulars (Pars. 8-b, c) alleges that he provided none of his clients with such statements.

In my opinion, the evidence establishes Respondent's guilt of this charge, but not in all of the cases specified in the bill of particulars. My recommendations are deferred until the end of this report. My opinion is based upon:

(1) The testimony of Hyman Borsack, John Campbell, Dominick Dascoli, Stanley Luckman and Gilbert Zucker, that they were given no written statements by Respondent. Whatever other conclusions have been or may be expressed concerning their testimony, I accept that part.

(2) Complete omission to deal with the matter in the testimony of Ned Granat, Max Schmidt and Martha Schmidt, and failure of recollection by the witness Stanley Gart.

(3) The testimony of Ralph Groeger who, while not professing to have certain recollection of the matter, thought that Respondent gave him a written and verbal explanation of the expenses, without request.

I hold that the applicable rule, having been laid down for the obvious purpose of keeping counsel in particular, and the administration of justice in general, above reproach, compliance therewith may not be waived by the client, but neither need the statement be pressed upon him so as to require him to retain it. Finally, my conclusion as to the Groeger matter is limited to the fact that the client was given *a* written explanation, but not the yellow-sheet put in evidence by Respondent.

(48)

By the next specification it is alleged, in substance:

7-w:—That in violation of Special Rule 4-E of the Appellate Division, First Department, Respondent failed to file with said Court closing statements relative to the settlement and disposition of negligence matters based on contingent-fee arrangement. By the bill of particulars, it is alleged that Respondent failed to file any such statements. (Par. 8-b, c)

All of the transactions proved at the hearing occurred prior to the date when this rule took effect. I THEREFORE RECOMMEND DISMISSAL of this specification.

The substance of the next specification is:

> 7-x:—That Respondent divided his fees for legal services with other attorneys, who had neither performed any services nor assumed any responsibility in connection with the matters wherein the fees were earned and that he thereby violated the precepts of Canon 34. The bill of particulars alleges that Respondent shared his fees with Leo Conrad in the matters of Ralph Groeger, Lee Milford Vaughn and Dominick Dascoli, and with Michael Castoro (in the matters of) Hazel Cohen (Helen) Thompson and (Jennie) Pagano. (Par. 9)

In my opinion this charge is not sustained by the evidence, and I THEREFORE RECOMMEND ITS DISMISSAL. My Reasons:

The canon interdicts a division of fees without a division of services and responsibility in the matter, but the (49) evidence fails to show that such was the case in the transactions specified in the bill of particulars. The first three involved Leo or Leon Conrad. It is not disputed that Respondent shared his fees with Conrad in the Groeger and Dascoli cases, although there is no evidence touching the Vaughn matter. Respondent testified that in all cases sent to him by other attorneys, he paid them, but for sharing the responsibility and working on the case. He had previously testified, with specific reference to the Schmidt case, that Conrad had participated in the preparation and discussion of various papers and pleadings. Elsewhere, he testified that Conrad attended and participated in the closing out of the matters after settlement. Not that Respondent had any burden of disproving allegations unsupported by evidence. But he did give his evidence and it is the only evidence in the case, since, as previously noted, Mr. Conrad was not called. Neither was Michael Castoro.

The only proof of the Cohen, Thompson and Pagano transactions is in the testimony of Respondent, elicited on cross-examination. His sharing of fees with Castoro in these matters is admitted. But he testified that Castoro came into the office, looked at the medical, discussed what should be done in the cases and shared the work and responsibility. Mr. Castoro's absence was not accounted for.

The next specification charges, in substance,

> 7-y:—That respondent simultaneously represented clients whose interests were antagonistic to and in conflict with each other, in violation of Canon 6. The conflict is identified by the bill of particulars (Par. 10) as involving William V. Buscemi, a passenger, and Benedetto Giliberti, the owner and operator of the car in which both were at the time of the accident.

(50)

In my opinion this charge is not supported by the evidence. I THEREFORE RECOMMEND ITS DISMISSAL.

The canon dictates that it is the duty of a lawyer, at the time of retainer, to disclose to the client all the circumstances of his relations to the parties, and any interest in, or connection with the controversy, which might influence the client in the selection of counsel. It is declared to be unprofessional to represent conflicting interests, except by express consent of all concerned, given after a full disclosure of the facts. The only evidence in the case shows that this precept was honored.

Respondent testified that he had been put in touch with Mr. Giliberti through one of the latter's friends, who communicated with Respondent's sister. By telephone appointment, Respondent went to see Giliberti, at his pharmacy, where Buscemi was employed. The facts were learned. As a passenger Buscemi, naturally, was a witness. When he asked if Respondent would represent him too, Respondent agreed, but gave both men to understand that, for tactical reasons which he outlined in view of the

operator-passenger status, Giliberti's case would have to be processed first. He explained to both how he would handle it, Giliberti first and, when he got through with that, he would handle Buscemi's claim. Accordingly, nothing was done on Buscemi's claim until Giliberti's had been settled in July. In August, Buscemi was brought to Leon Siken's office and Siken's name was used, dummy-wise, as attorney of record. This was done to avert a prejudice which Respondent supposed would visit Buscemi if the insurer found that Respondent was also representing the passenger. In some features of his testimony, Respondent is confirmed by Buscemi.

Buscemi agreed that Respondent had come to see Giliberti and that he knew that Respondent had engaged to represent Giliberti. On one hand, he said, that there was no talk, at that time, of using another lawyer's name and that he didn't hear of (51) Mr. Siken until later. On the other hand, he agreed that Respondent had said, at one time or another, that it "might be advisable to use another lawyer's name." Moreover, it was not until some two or three months after the first interview that *he* got in touch with Respondent about handling the case (the retainer was signed on the first interview) and he was "almost sure" that by then, Respondent had settled Giliberti's case. Thus, by prior agreement made after full and fair disclosure, Respondent did not actively represent Buscemi until a question of conflict no longer existed, and in any event both parties concerned were aware of the situation and expressly agreed. By Buscemi's own acknowledgement, he did not press Respondent for action until the Giliberti matter was over and done with.

The next specification alleges, in substance,

> 7-z:—That Respondent divided fees for legal services with persons other than lawyers, for services rendered by such persons in the settlement of legal claims or suits, in violation of Canon 34. One such person is named by the bill of particulars. (Par. 11) He is James Citroen.

In my opinion, the evidence establishes the Respondent's guilt, as charged. My recommendation is deferred until the end of this report.

The only issue of fact presented here, is whether Respondent, when he admittedly divided his fees with Citroen, knew that he was not a lawyer. He contends that, in good faith, he believed Citroen to be a lawyer. On that issue I find against him. Five checks in payment to Citroen were put in evidence. Three of them I put out of the case as not constituting a division of fees, and I consider them only on the question of Respondent's knowledge (52) of Citroen's status as a layman. As to the payments evidenced by the other two checks, Petitioner's case is convincingly proved, it being stipulated that Citroen is not now and never was a lawyer.

Respondent's testimony was, that he hadn't known Citroen long; he employed and paid him in the Zucker case which, by reference to the settlement-checks, was closed out on March 19, 1954; he had been recommended by someone, not named, and Respondent had heard from other lawyers that Citroen was a lawyer. He understood that Citroen had done business with the most reputable firms in New York, but couldn't remember the firm-names; he couldn't remember whether he consulted the phone book for the number but, in any case, he communicated with Citroen, who represented himself to be a lawyer and, as far as Respondent knew, he was a lawyer. As for the nature of Citroen's services, he helped prepare and settle the cases. He didn't draw pleadings, but arranged physicals and discussed medical aspects, bills of particulars, etc. He didn't sit in on pre-trial sessions nor was he trial counsel. He never went into a court-room with Respondent to participate in any trial or court procedures. He was paid out of Respondent's fees, but "not any percentages." And the "client paid no part of that." Respondent didn't think that there was any ten-percent arrangement but, if there was, there were other reputable counsel whom he also engaged on a retainer-plus-ten-

percent basis. On the issue of Respondent's knowledge, all five checks are now considered.

The Zucker case, it will be recalled, was settled for $7,000.00. The ledger showed check #5204, (dated a week before the settlement checks) to Citroen's order, for $700.00, as being charged to that case.

The Groeger case, as will also be recalled was settled for $5,000.00. The ledger showed check #6290, (dated one day before the smaller check) to Citroen's order, for $500.00, as being charged to that case.

(53)

There was put in evidence a photostatic copy of a check #7617, dated May 31, 1955, to Citroen's order, for $950.00, earmarked as issued in the case of *Thompson v. Potonides*. It was subsequently stipulated that it had been identified with check-stubs showing payments to each of four plaintiffs in a total sum of $4,705.00. It was also stipulated that Respondent's was a fifty percent retainer in that case; that, in his ledger, he credited himself with fees of $800.00, $755.00, $1,000.00 and $2,150.00 respectively (which add up to $4,705.00) and that the stub of the Citroen check was also earmarked in the Thompson case.

There was also put in evidence another photostat, of a check #9235, dated March 23, 1956, to Citroen's order in the sum of $575.00. Here, it was stipulated that the stub showed a deposit of $5,750.00 in a Levenstein matter, with check #9235 charged to the same matter.

There was also put in evidence a fifth check, #7010, dated March 23, 1956, to Citroen's order in the sum of $700.00. This check has not been identified with any specific transaction. The ten percent standard of compensation is evident. Perhaps, as Respondent contends, he did engage counsel on a fee plus ten percent basis. But admittedly, Citroen never set foot in a court-room. He was not an attorney, and I am convinced that Respondent knew it. The two transactions considered on the issue of fee-division are those involving the Levenstein matter and the unidentified transaction shown by check

#7010, for $700.00. The Zucker, Groeger and Thompson cases were not considered on that issue because the figures show that the Citroen payments (or expenses including his payment) were taken from the top and not from the fees. Respondent's testimony to the contrary is rejected. (54)

By the next specification it is alleged, in substance,

> 7aa:—That Respondent wilfully procured and induced clients and witnesses to testify falsely at hearings being conducted, by an Additional Special Term of the Supreme Court, into the conduct of attorneys and others. Petitioner's bill of particulars names nine such persons and alleges that Respondent told them to state that they had received the proceeds of certain checks issued in their respective names when, in truth, they had not and when, in truth, the proceeds thereof had been received by Respondent. (Par. 12)

As developed at the hearing, the core of the charge is that Respondent procured the clients to falsely testify that they had received the smaller checks and their proceeds. Of the nine persons named, six must be culled as having given no evidence in the area. They are John Campbell, Hyman Borsack, Ann Borsack (not called), Bernard Rickles (not called), Bernard A. Stoller (not called), and Stanley Luckman. Those who did testify on the subject were Ned Granat, Dominick Dascoli and Gilbert Zucker.

In my opinion the evidence sufficiently establishes Respondent's guilt of having induced and procured Dominick Dascoli and Gilbert Zucker to testify falsely, as charged. My recommendation is deferred until the end of this report.

Respondent's guilt depends upon the testimony of admitted perjurers and, of course, a conclusion of guilt is insupportable without external corroboration. In the Granat case it is lacking and there is evidence in the testimony of Lewis Bernstein, an attorney not involved

in this proceeding, that Granat was indebted to him and that a sum was paid, by Respondent, to the attorney, in payment of the debt. Respondent's testimony was to the same (55) effect. There is a brother-in-law relationship between the attorney and Granat and, while the attorney had profitable business dealings with Respondent he also has ties of affinity with Granat. Granat denied having authorized Respondent to pay the sum of the smaller check over to his brother-in-law, but as the record will disclose, he had a poor memory and otherwise seems to have a sub-normal mentality. Most of his examination was by leading questions and, when not led, some of his responses failed to meet the questions asked. They answered matters previously inquired into. Of course, Respondent may have taken too much upon himself in handing over Granat's money in payment of the debt, but the charge is perjury and, even though the prudence of the action might be doubted, or even the authority, corroboration of the perjury charge would have to be found in perjury, committed by Respondent and, by Mr. Bernstein, through Respondent's procurement. The only matter of doubt in Mr. Bernstein's testimony was the amount. It might, he said, have been one or two hundred dollars, but he couldn't be sure. I resolve the doubt in Respondent's favor.

Neither Dascoli's testimony, nor that of Zucker, needs to be considered at any length. Each admitted having perjured himself by testifying, at the Judicial Inquiry, that he had received the smaller check, kept it and got the proceeds. Each said, in substance, that Respondent induced him to so testify. Dascoli recanted after he had been threatened with perjury and after he had telephoned his wife and talked it over with her. Zucker let his perjury lie, unconfessed, until Petitioner began preparation for the institution of this proceeding. Meanwhile, he had compounded it with a false affidavit. His remorse is quite apparent from the record. It was even more so in the court-room. I have freely used the word perjury, implying a finding that these two men did testify falsely before

the Judicial Inquiry, as just indicated, and I do so find. There is no dispute that they testified to the effect just described, and the evidence convinces me that neither of them kept the smaller checks nor received the proceeds. (56) I believe the testimony of each, that Respondent procured him to testify to the contrary. The required corroboration has been supplied by the respondent himself.

An important aim of the Judicial Inquiry was to discover where the smaller checks and their proceeds had gone. It seems obvious that the purpose was to open the path to further investigation and weed out wrongdoers in various areas. A variety of offenses was suggested by the tenor of Respondent's cross-examination in the instant case. He denied all of them. The aim of the perjury committed at the Judicial Inquiry was, just as plainly, to thwart discovery of where the checks had gone and who had gotten the proceeds. The accomplices are corroborated by evidence that Respondent fabricated evidence to avoid a visitation of justice for the subornation and thereby evinced consciousness of his guilt of that crime. Reference has already been made to the yellow sheets which Respondent put in evidence on the hearing. He testified that they were prepared and placed before the clients at the closing. Not once was the sheet used in cross-examination of the client to whose case it referred. But that is not all.

In the Dascoli case, as will be recalled, the ledger-entries and the distribution figures showed that the expenses had been taken from the top, before distribution. In that respect, it was in accord with the system of computation used in all other cases proved. The *Thompson* case (page 38, *ante*) was figured the same way. But in the yellow-sheet, the expenses were taken from the client and they included items not shown in the ledger. And, by more than coincidence, deduction of the expenses from the client's share gave the same net as shown to have been paid by the primary check. Dascoli, it will be recalled, had no complaints, then or now. *He was satisfied with his $3,000.00,* as he agreed on cross-examination.

But the yellow sheet shows that he got an additional $500.00 as "Adj—lost salary." His statement that he was satisfied was accepted, on cross-examination, without challenge. And then (57) Respondent produced his yellow sheet and testified that there had been a complaint which occasioned the $500.00 increase.

In the Zucker case the same things happened. Ledger-entries and distribution figures show expenses taken from the top, including Citroen. The yellow sheet shows them taken from the clients in a lesser amount, Citroen excluded, with numerous items not shown in the ledger. But by the same more-than-coincidence, the total of the expenses, when deducted from the client's share of one-half of the gross, makes the same primary amount paid to Zucker. And, though Mr. Zucker "really wasn't interested at the time", the yellow sheet shows that $1,000.00 was added to his primary check:—"Clients—Leo asked favor." Respondent's testimony ran in the same direction.

I find the yellow sheets to have been fabricated to frustrate discovery of the truth as to where the smaller checks and their proceeds had gone, both in the *Dascoli* case and the *Zucker* case and, were there any point to it, in all of the others. But the others are not needed to negate inadvertence or mistake in the Dascoli or Zucker yellow sheets. Respondent excluded that possibility, under oath. In that case, the yellow sheets are good evidence of a comprehensive scheme and plan to conceal the actual disposition of the proceeds of all of the smaller checks and thus defeat the purposes of the hearing. I find that Respondent committed perjury by falsely testifying that his yellow sheets were records made in the regular course of the transactions concerned, and that they were displayed to the clients, and by falsely testifying that the clients had kept the checks and received the proceeds. Neither was true. If such yellow sheets were in fact employed by Respondent as a regular device in the settlement of every client's negligence case, it is most singular that Respondent, ably represented by most astute counsel,

did not seek to buttress his testimony by producing the files of every case settled by him during the periods in question and exhibiting the presence therein of such yellow settlement sheets. That omission speaks volumes.

The next specification charges, in substance,

(58)

7-bb:—That Respondent attempted to impede—and impeded—the administration of Justice by wilfully procuring and inducing clients to ignore subpoenas requesting their appearance at hearings of the Additional Special Term.

In my opinion this charge is not supported by the evidence. I THEREFORE RECOMMEND ITS DISMISSAL.

In this case, I accept, without reservation, the testimony of William C. Mattison from which it appears that a jurisdictional issue was an open and moot question right down to the second week of September 1958, and that there was an understanding between counsel, that witnesses were not to be pressed for attendance until the question had been decided. I hold that any advice accordingly was given, in good faith, consistently with that understanding, and does not involve Respondent in guilt of the offense charged.

The next specification is alleged in Paragraph 7-cc: of the Petition. It need not be summarized farther than to say that as narrowed by the bill of particulars, it charges Respondent with Subornation of perjury, in that he procured and induced William V. Buscemi to testify falsely in the matter and along the lines discussed earlier in this report (pages 4 to 10 *ante*).

I RECOMMEND ITS DISMISSAL. Beyond a reiteration of the fact that Buscemi is not corroborated, comment seems unnecessary in view of the prior content of this report.

The charge made by Paragraph 7-dd: of the Petition, is in substance, that Respondent failed to maintain a respectful attitude toward various courts. (Bill of particulars, Par. 15). It is wholly without evidence to support it. I RECOMMEND ITS DISMISSAL.

The charge made by Paragraph 7-ee: of the Petition, is in substance, that Respondent agreed with clients to bear the expenses of litigation, without reimbursement. (59)

It is, in my opinion, unsupported by the evidence. The clients named in the bill of particulars are Rickles, Campbell, Zucker and Stoller. Rickles and Stoller were not called, Campbell and Zucker testified to no such agreement and Respondent denied it.

I RECOMMEND ITS DISMISSAL.

The charge made by Paragraph 7-ff: of the Petition, is in substance, that in the prosecution of various claims, Respondent prepared or permitted preparation of statements which he knew or should have known were false and exaggerated, etc., with intent to defraud insurance companies, etc. The offense is alleged to have been committed in all cases. (Bill of Particulars, Par. 17). This is, in effect, an inferior degree of the offense charged in Paragraphs 7-a to 7-j of the petition, already dealt with in this report. In my opinion it is not sustained by the evidence. I THEREFORE RECOMMEND ITS DISMISSAL.

The charge made in Paragraph 7-gg: of the Petition is, in substance, that Respondent grouped claims in violation of applicable Special Rules and Precepts of the Canon of Ethics. It was abandoned by Petitioner at the conclusion of the hearing, there concededly being no evidence to support it.

I RECOMMEND ITS DISMISSAL.

(60)

CONCLUSIONS AND RECOMMENDATIONS.

Conscious of the impact which an adverse recommendation by me may have upon the Respondent's professional career, I have assumed the task assigned to me by this Court with prayerful consideration and with a view towards resolving every reasonable doubt in Respondent's favor. I believe that I have done so. In spite of such an approach and a predisposed reluctance to look favorably upon charges thrust on a member of the Bar I have been forced to the conclusion

1. That the "Respondent failed to provide clients" in some instances "with statements relative to the settlement and disposition of their cases" as required by Rule 4-B of the rules of the Appellate Division First Department. (Charge 7-v, dealt with at p. 47 of this report)
2. That "Respondent divided fees for legal services with persons other than lawyers for services rendered by such persons in the settlement of legal claims or suits in violation of Canon 34," to wit, with one James Citroen. (Charge 7-z, dealt with at p. 51 of this report)
3. That "Respondent wilfully procured and induced clients and witnesses" specifically Dominick Dascoli and Gilbert Zucker "to testify falsely on hearings being conducted by an additional Special Term of the Supreme Court into the conduct of attorneys and others" and more specifically "that Respondent told them to state that they had received the proceeds of certain checks issued in their respective names when, in truth, they had not." (Charge 7-aa, dealt with at p. 54 of this Report) and,
4. That Respondent committed perjury before me in his testimony with reference to the so-called "yellow sheets" and the alleged retention by his various clients of the proceeds of the "smaller" checks herein dealt with

by reason of which he is unfit to remain a member of the profession of the Law.

(61)

I should add that if Items 1 and 2 above were alone involved I would recommend that the punishment to be imposed upon the Respondent be a severe censure.

Most respectfully submitted,

Dated: March 6, 1961

J. IRWIN SHAPIRO
Acting Justice of the Supreme Court

Memorandum Opinion of Appellate Division

PETITION OF EDWARD S. SILVER, DISTRICT ATTORNEY OF THE COUNTY OF KINGS, PURSUANT TO SECTION 90 OF THE JUDICIARY LAW, PETITIONER v. DAVID A. GOLDNER, AN ATTORNEY AND COUNSELLOR AT LAW, RESPECTIVELY

SUPREME COURT, APPELLATE DIVISION 2d Department
15 A. D. 2d 558, 222 N.Y.S. 2d 854 (Dec. 27, 1961)

Memorandum by the Court:

"In a disciplinary proceeding against respondent as an attorney and counsellor at law, petitioner moves to confirm the report of the Special Referee.

"Motion granted; respondent disbarred and his name ordered to be struck from the roll of attorneys.

"In our opinion, the charges enumerated below upon which the Referee found respondent guilty, are amply supported by the record and show clearly his unfitness to remain a member of the Bar. These charges are: (a) failure to provide clients with statements relative to the settlement and disposition of their cases; (b) division of fees for legal services with persons other than lawyers; (c) subornation of perjury; (d) perjury committed upon the hearings before the Special Referee.

"In our opinion, respondent's guilt of charges (a), (b), and (c), supra, is sufficient to warrant his disbarment without consideration of his guilt on the fourth charge, (d). However, his guilt on such fourth charge leaves no question as to the nature or extent of the discipline here required. When an attorney has deliberately attempted by perjured testimony to escape the consequences of his misconduct, he is no longer fit to remain a member of the profession (Matter of Sidman, 268 App. Div. 1040, 52 N.Y.S. 2d 286, leave to appeal denied 294 N.Y. 645, 60 N.E. 2d 551; Matter of Smith, 148 App. Div. 291, 295, 132 N.Y.S. 304; Matter of Thorn, 164 App. Div. 151, 149 N.Y.S. 507).

"A further hearing is unwarranted. The record amply sustains the findings of the Special Referee, without re-

sorting to any alleged extra-judicial checking of the so-called 'yellow sheets.'"

BELDOCK, Acting P.J., and CHRIST, PETTE and BRENNAN, J.J., concur.

KLEINFIELD, J., not voting.

Order of Affirmance of Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 26th day of March in the year of our Lord one thousand nine hundred and sixty-four, before the Judges of said Court.

Witness,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk.*

REMITTITUR March 26, 1964.

2

No. 445

In the matter of

EDWARD S. SILVER, District Attorney, Kings County, pursuant to Section 90 of the Judiciary Law,

Respondent,

vs.

DAVID A. GOLDNER, an Attorney and Counsellor at Law,

Appellant.

BE IT REMEMBERED, That on the 12th day of December in the year of our Lord one thousand nine hundred and sixty-three, David A. Goldner, an Attorney and Counsellor at Law, the appellant in this cause, came here unto the Court of Appeals, by Frederick B. Boyden, his attorney,

and filed in the said Court Notices of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Edward S. Silver, District Attorney, Kings County, pursuant to Section 90 of the Judiciary Law, the respondent in said cause, afterwards appeared in said Court of Appeals pro se.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Frederick B. Boyden, of counsel for the appellant, and by Mr. Stanley M. Meyer, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

WHEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well as Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 26, 1964.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON
Clerk.

Order of Court of Appeals Amending Remittitur.

(December 7, 1967.)

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of December A. D. 1967.

PRESENT, HON. STANLEY H. FULD, *Chief Judge, presiding.*

2 Mo. No. 1207

In the Matter of

EDWARD S. SILVER,
District Attorney of the County of Kings, pursuant to Section 90 of the Judiciary Law,

Respondent,

vs.

DAVID A. GOLDNER,
an attorney and counselor at law,

Appellant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the hearing of the motion for reargument of the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, to wit: The appellant argued that he had been deprived of his constitutional rights in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States in each of the following respects: (1) Appellant's disbarment proceeding was constitutionally defective; (2) appellant's records were confiscated by an unconstitutional general search; (3) appellant was denied access to his records to prepare a defense and avail himself of the effective assistance of counsel; (4) appellant was found guilty of an offense with which he had not been charged in violation of due process of law; and (5) appellant has neither waived nor acquiesced in the violation of his constitutional rights. The Court of Appeals held that there was no violation of any right guaranteed to him by the Constitution of the United States in any of the above respects.

AND the Appellate Division of the Supreme Court, Second Judicial Department, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

APPENDIX C.

Exhibit 1.

(PHOTOPRINT)

[For convenience of Court and Counsel this Document is bound in on the opposite page]

In the Matter of the Petition of Edward S. Silver, District Attorney of the County of Kings, pursuant to section 90 of the Judiciary Law, petitioner, against David A. Goldner, an Attorney and Counsellor-at-law, respondent.

BRENNAN, J. Motion to confirm report of Hon. J. Irwin Shapiro granted and respondent disbarred. September 29, 1961

Christ, J. U.A.C (Mr) Oct 6 1961

A Man should not be disbarred except after a hearing of the charges against him. The respondent is being disbarred for perjury before the referee, but he has never been so charged that he can prepare his answer and be heard on the issue. I do not believe that this should be done. The case against this respondent is a bit weaker than I supposed it to be. We must discuss it before we can decide the matter. Even the subornation of perjury is [illegible] dependent on the testimony of the perjurers, the corroboration seems weak.

Exhibit 2.

PETTE, *J.*

Under the Special Referee's decision respondent was found guilty of four offenses (Report, pp. 60-61):

(1) Failure to furnish closing statements;

(2) Dividing legal fees with one non-lawyer;

(3) Inducing two witnesses to testify false in the Inquiry;

and

(4) Committing perjury before the Referee through the media of the so-called "yellow sheets."

On offenses Nos. 1 and 2 the Referee only indicated that a punishment no more severe than censure would be in order, but that the other offenses added thereto required disbarment.

On No. 3 only the testimony of Dascoli and Zucker was found indicative of respondent's guilt (although nine persons were at first alleged), and the finding of guilt thereon is dependent upon the rejection of the "yellow sheets" in their cases (Sp. Ref's Rep., p. 57). On No. 4, it seems to me, we have a dispute over whether the "yellow sheets" were so fairly in issue as to require respondent to verify their legitimacy. On No. 4 we have the Referee's comment that not only were the Dascoli and Zucker "yellow sheets" fabricated but that all of respondent's "yellow sheets" were false, though these others were not in issue, and the Referee's further comment that "it is most singular" that respondent did not produce all his files to show that all contained such "yellow sheets" (Report, p. 57).

Since, in effect, the severity of punishment is dependent upon the legitimacy of all the "yellow sheets" used by respondent during the period of time in question, it is my present view that this issue should be sent back for further hearing and report to cure the void thereon in the present record. After such hearing and report, a proper finding may be made as to whether all of the "yellow sheets" were in fact innocent or tainted, an issue

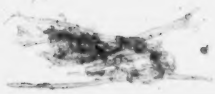
on which at present there can only be conjecture since respondent was neither taxed therewith nor advised that an explanation thereon should be forthcoming.

Exhibit 3.

In the Matter of the Petition of Edward S. Silver, District Attorney of the County of Kings, pursuant to section 90 of the Judiciary Law, petitioner, against David A. Goldner, an Attorney and Counsellor-at-law, respondent.

BRENNAN, J.	Motion to confirm report of report of Hon. J. Irwin Shapiro granted and respondent disbarred.	September 29, 1961

Beldock, Acting P. J. Concur.
Kleinfeld, J. V.A.C.
Christ, J. V.A.C. (see memorandum attached)
Pette, J. V.A.C. (see Memo. attached)



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1205

DAVID A. GOLDNER,

Petitioner,

—against—

EDWARD S. SILVER, District Attorney, Kings County, State of New York,

Respondent.

BRIEF OF RESPONDENT ON PETITIONER'S PETITION FOR WRIT OF CERTIORARI

AARON E. KOOTA
District Attorney Kings County
Municipal Building
Brooklyn 1, New York
Attorney for Respondent

STANLEY M. MEYER
Assistant District Attorney
of Counsel

To:

EDWYN SILBERLING
1501 Franklin Avenue
Mineola, New York 11501

BERNARD A. BERKMAN
LARRY S. GORDON
JOSHVA J. KARCELBAUM
GERALD A. MESSERMAN
1320 Superior Building
Cleveland, Ohio 44114

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TABLE OF CONTENTS

	PAGE
Previous Proceedings	1
POINT I—Respondent agrees with petitioner that a writ of certiorari be granted. It is important for the State of New York as well as other states to know whether *Spevak* v. *Klein*, 385 U.S. 511 is retroactive and whether any records kept by attorneys may be properly subpoenaed	3
POINT II—Petitioner was not denied due process of law but was given all procedural requisites inherent in the concept of a fair hearing as applicable to proceedings of this type	5
POINT III—The findings of the Special Referee were not improper	10
CONCLUSION	12

AUTHORITIES CITED

Cases

Ames v. Dubinsky, 70 N.Y.S. 2d 706	9
Bradley v. Fisher, 13 Wall 335, 80 U.S. 335	10
Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S. Ct. 1743	5
Cohen v. Hurley, 366 U.S. 117	3, 6
Ex Parte Wall, 107 U.S. 265	5-6, 9, 10
Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400	11
In re Oliver, 333 U.S. 257	11
Justice v. Lang, 52 N.Y. 323	11

PAGE

Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 10
Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 9
Matter of Broome, 13 A.D. 2d 657 ..... 9, 11
Matter of Kaplan, 13 A.D. 2d 231 9
Matter of Mogel, 18 A.D. 2d 203 ..... 6, 9, 11

People v. Loria, 10 N.Y. 2d 368, 179 N.E. 2d 478 9
People v. Terra, 303 N.Y. 332, 102 N.E. 2d 576 11

Randall v. Brigham, 74 U.S. 532 6

Sackler v. Sackler, 15 N.Y. 2d 40 9
Shapiro v. United States, 335 U.S. 1 4
Sharkey v. Thurston, 268 N.Y. 23, 196 N.E. 766 9
Spevak v. Klein, 385 U.S. 511 ..... 3, 4, 5

Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241 11

IN THE

Supreme Court of the United States

October Term, 1967

No.

DAVID A. GOLDNER,

Petitioner,

—against—

EDWARD S. SILVER, District Attorney, Kings County, State of New York,

Respondent.

BRIEF ON BEHALF OF RESPONDENT

Petitioner seeks a Writ of Certiorari in order to review a judgment of the Court of Appeals of the State of New York, entered on December 7, 1967 amending the judgment of the Court of Appeals entered on March 26, 1964, which affirmed an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated December 27, 1961 (15 A.D. 2d 558) disbarring Petitioner and ordering his name stricken from the roll of attorneys. A previous application for a Writ of Certiorari was denied by this Court at 379 U.S. 959 (1965) and a petition for rehearing was denied at 380 U.S. 926.

Previous Proceedings

The proceedings below were begun by a petition of Edward S. Silver, District Attorney of Kings County, verified on July 15, 1960, charging petitioner with 33 acts

of misconduct, the issues having been then referred to Hon. J. Irwin Shapiro, Special Referee, to hear and report, together with his recommendations, by order of the Appellate Division dated October 31, 1960.

The Special Referee heard testimony from December 1, 1960, to December 7, 1960, and filed his report, dated March 6, 1961, in which he made four conclusions and recommended disbarment. The motion to confirm the Special Referee's report was granted thereby causing petitioner's disbarment and a motion to stay respondent's motion to confirm the Referee's report was denied on June 21, 1961. Petitioner moved to set aside the report of the Referee which was denied by order dated September 21, 1961, reargument of which was denied by order dated October 5, 1961. A further motion for reargument and reconsideration was denied on May 13, 1963. The Court of Appeals of the State of New York affirmed the order of disbarment without opinion on March 26, 1964 (14 N.Y. 2d 593). This Court denied an application for a Writ of Certiorari at 379 U.S. 959 and an application for rehearing was denied at 380 U.S. 926. The remittitur was amended by the Court of Appeals of the State of New York on December 7, 1967. It provided that there was no violation of petitioner's constitutional rights guaranteed him by the Constitution of the United States.

Prior to the institution of the proceedings before Hon. J. Irwin Shapiro, the Judicial Inquiry conducted an investigation in 1958, at which petitioner appeared and testified on two occasions and to which he delivered financial books and records pursuant to a subpoena *duces tecum*. These books and records were not physically returned until after the conclusion of the proceedings before the Special

Referee. The subject under investigation was solicitation and related unethical practices in Kings County. Petitioner moved for the return of his records in November, 1958, in the Appellate Division and in January, 1959, before the Special Term of the Supreme Court. Both motions were denied.

Regarding the hearing before the Special Referee, petitioner was represented by counsel, presented evidence, cross-examined witnesses, was given many months to prepare his case and was served with formal charges and particulars of the charges. Not once during the hearing did petitioner object, complain, ask for an adjournment or raise the issue that the retention of his records was illegal or that he had been prevented from preparing his defense. He never alleged that he was prevented from copying, using or working with his records.

POINT I

Respondent agrees with petitioner that a writ of certiorari be granted. It is important for the State of New York as well as other states to know whether *Spevak* v. *Klein*, 385 U.S. 511 is retroactive and whether any records kept by attorneys may be properly subpoenaed.

When the case at bar originally made its way through the New York Appellate Courts and even when the application for a Writ of Certiorari was made to this Court, *Spevak* v. *Klein*, 385 U.S. 511, had not yet been decided and *Cohen* v. *Hurley*, 366 U.S. 117, expressed the existing law. Examination of the terms of the subpoena in this case (appendix A. p.1a) shows that the subpoena was as broad

as that referred to by this Court in the *Spevak* decision. Thus, had *Spevak* been decided at the time the subpoena was issued, petitioner may have had the right to refuse to turn over a good deal of the records and data requested. In *Spevak,* the grounds of disbarment however was the refusal to comply and the invocation of the privilege of self-incrimination. Here, the petitioner did comply and actually turned over the records, conduct which, respondent submits, raises another important issue. This Court, in the *Spevak* majority opinion indicated that consideration of the question of whether certain types of records under the authority of *Shapiro* v. *United States,* 335 U.S. 1 might not be covered by the privilege was not necessary to its decision since the attorney had been disbarred for merely raising the privilege. Mr. Justice Fortas in his concurring opinion indicated that he might have voted for affirmance had the case presented the question of whether an attorney might be disbarred for refusal to produce records he was required lawfully to keep as a proper part of his being a licensee in a high calling. In addition, three Justices dissented and took the position that disbarment under the circumstances of the case was constitutionally permissible.

In the case at bar, respondent thinks that the scope and application of the *Shapiro* principle is presented. This is true because although the subpoena appears, by the decision in *Spevak,* to have been too broad, respondent will argue that the records actually used against petitioner at the disciplinary hearings related only to his function as an attorney with relation to specific cases he handled and would properly be the subject of a subpoena even today. The use of these records constituted no harm.

Of course the issue of whether petitioner can take advantage of the decision of *Spevak* v. *Klein, supra,* even if it applied and would have forbidden use of any of the records used at the hearing, at this time, long after all appellate remedies have been exhausted, is also an important issue.

The two issues, the applicability of *Spevak* to proceedings already concluded and the relevance of the privilege of self-incrimination to non-personal, relevant, business records of an attorney seem to make it desirable to all parties to this controversy that the writ prayed for be granted. The position of respondent by no means is an indication that respondent believes however that the case should be reversed.

POINT II

Petitioner was not denied due process of law but was given all procedural requisites inherent in the concept of a fair hearing as applicable to proceedings of this type.

The soundness of the legal basis of the disciplinary proceedings in this case being unassailable, the question arises as to what standards of due process must be afforded a respondent. The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation but is unfixed and based upon considerations of time, history, reason and past course of decisions. *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy,* 367 U.S. 886, 81 S. Ct. 1743. Disciplinary proceedings not being penal in nature, it has been held that they need not be formal, nor does the burden of proof beyond a reasonable doubt exist. *Ex Parte Wall,*

107 U.S. 265; *Randall* v. *Brigham*, 74 U.S. 532; *Matter of Mogel*, 18 A.D. 2d 203. Procedures can be adopted which considered as a whole in view of the nature of the proceedings may be different from those normally required in criminal prosecutions. *Cohen* v. *Hurley*, 366 U.S. 117.

Petitioner complains that his books and records were not physically returned to him prior to the hearings before the Referee thus depriving him of an opportunity to prepare a defense, a right which is concededly included in the concept of fair procedure. The right to which he is entitled though is the opportunity to prepare a defense or explanation and if he is not handicapped in doing so even though his books may be retained illegally, which we argue was not the case here, his rights of due process are not violated. Petitioner bases his contention that the books were illegally retained on his position that no order existed sanctioning the impounding of such records. Yet, he states that he moved for their return in the Appellate Division and then in the Supreme Court, both motions having been denied. It is an exercise in semantics to say that an order denying the request for the return of the books should be viewed differently than one authorizing their retention. The only difference between the two is the identity of the party initiating the motion, the issues litigated and the principles considered therein being the same. The denial of these motions were sufficient authority for retention of the records, if such authority be required by way of Court Order. Implicit in petitioner's argument that no order existed for the retention of his records must be the recognition, which is founded on law, that retention would be proper under certain circumstances. It is not true then that where such records will be

offered in an anticipated disciplinary proceeding involving the special relation of an attorney to the public that there is a duty to retain them? There was ample justification for scrutinizing these records and judicial grounds for keeping them.

It is paramount to remember that petitioner's essential claim is really not that the refusal to return his books constitutes deprivation of his constitutional rights but that his right to prepare his defense was interferred with by their retention. Assuming arguendo that it could be concluded that petitioner, although he did not have physical possession of these records, did have the opportunity to examine them, work with them and copy them, his right to prepare his defense would have remained inviolate. What then occurred in the case at bar? Nowhere does petitioner claim that he was ever denied access to these books and nowhere does he deny that he or his representatives were allowed to work with them. This omission speaks volumes, for the concept of due process does not dictate that a person make use of his opportunity, but only that it be available to him. This is not only true if petitioner did not make use of this opportunity but more so if he did. Petitioner has also not shown how the physical retention of these records have handicapped him. The fact is, the only demand petitioner ever made, via motion and letter, (SR. 181-183) was for the physical return of these records. He never asked according to this record, that he be allowed to use, work with, or copy them. Likewise, at the outset of the hearing no objection was made nor was this issue raised in any form. At the beginning of petitioner's case (H. 388) nothing was said, nor was objection made when petitioner himself testified (H. 425). There was no objection made when the

accountant for the petitioner below testified (H. 210) nor when he referred to these records. Neither was a question raised when the accountant referred to his work sheets (H. 215) although he testified at great length. Actually, petitioner was prepared to meet the testimony of the District Attorney's expert because petitioner introduced much documentary evidence in an effort to dispel the statements of the accountant (H. 450, 452-57, 464, 471, 483, 493) and testified at great length regarding his checks (H. 755-57). Petitioner was first apprised of the areas into which investigation was being conducted by his questioning at the Judicial Inquiry and was later specifically advised by the specifications and bill of particulars served on him. He was given exact notice of the charges against him and had many months to prepare his case. The record of the hearings shows that he did so. He introduced evidence, called witnesses, cross-examined and was afforded every opportunity to controvert or explain the charges. He never raised his claim that he had been deprived of an opportunity to prepare a defense nor asked for an adjournment at any point in the hearings. There is no doubt that Special Referee Shapiro would have accommodated him had such a request been made. Even after the hearings were completed when the Referee gave petitioner time to submit a brief this issue was not raised (H. 781-82).

Petitioner sought to demonstrate below that the retention of his records handicapped him by arguing that he could have explained the division of settlement monies regarding a client named Dascoli. This argument was not new and was made in the same language by him at the hearing (H. 276). An examination of the records in this case will show that this holds true regarding all of the items

testified to by the expert witness. Petitioner has failed to show below that any information he could have learned from these records, if in fact he didn't examine them, would have altered in any way anything that occurred at the hearing.

A complete opportunity was presented petitioner to defend these proceedings including all elements of fair procedure and notice applicable to actions of this type. He did not raise his claim at any time during the hearings and did not show how he has been prejudiced.

The retention of petitioner's records could not constitute an illegal search or seizure since this was not a criminal proceeding. *Sackler* v. *Sackler,* 15 N.Y. 2d 40. More protection was given to petitioner in terms of procedure calculated to provide him with a fair hearing than has been required by law. *Sharkey* v. *Thurston,* 268 N.Y. 23, 196 N.E. 766; *Ex Parte Wall, supra; Matter of Mogel, supra; Ames* v. *Dubinsky,* 70 N.Y.S. 2d 706; *Cohen* v. *Hurley, supra; Matter of Broome,* 13 A.D. 2d 657; *Matter of Kaplan,* 13 A.D. 2d 231.

It is alleged that *Mapp* v. *Ohio,* 367 U.S. 643, 81 S. Ct. 1684 was decided after petitioner's disbarment but before the pending appeal was decided and that whether the decision is to be applied retroactive to this case is an issue here. Further it is claimed that a retroactive application would dictate a reversal. This is plainly not so. The Court of Appeals has already decided that *Mapp* is to be applied to all cases in New York where appeals are still pending, *People* v. *Loria,* 10 N.Y. 2d 368, 179 N.E. 2d 478 and since *Mapp* was actually discussed in the briefs and upon argument in that Court in this case, it is evident that the Court of Appeals considered whether the obtaining and retention

of petitioner's records constituted an illegal search and seizure. *Malloy* v. *Hogan,* 378 U.S. 1, 84 S. Ct. 1489 is not really applicable because in this case petitioner never refused to answer questions or give evidence on the grounds of self-incrimination and the basis for disbarment was not the same.

No privilege or claim was raised at any stage of the proceedings and no showing of a lack of reasonable opportunity to prepare a defense, which concededly is due petitioner, has ever been shown. The high duty owed by an attorney to the judiciary as well as the logical and well founded view of the proceedings below as being non criminal sustain the legality of requiring disclosures such as were actually used in the hearings below.

POINT III

The findings of the Special Referee were not improper.

The third and fourth findings of the Special Referee it is claimed were objectionable because petitioner had no notice of them. This is not improper because the Referee had no way of foretelling prior to the hearing that the circumstances would occur that would support these findings. When such is the case, there is no tenet of law preventing proper action by the hearing authority. *Ex Parte Wall, supra; Bradley* v. *Fisher,* 13 Wall 335, 80 U.S. 335. The Referee can draw all reasonable inferences from the evidence presented which reason and experience dictate. This would be true even if the instant proceedings were criminal but more so since they are not. *Tot* v. *United States,* 319

U.S. 463, 63 S. Ct. 1241; *Justice* v. *Lang,* 52 N.Y. 323; *People* v. *Terra,* 303 N.Y. 332, 102 N.E. 2d 576; *Matter of Mogel, supra; Matter of Broome, supra.*

The result of the Referee's conclusion had no penal effect and by no stretch of imagination could petitioner have been deemed guilty of a crime. These findings were within the function of the Referee and were carefully considered by the Appellate Division before its decision was rendered. The case of *In re Oliver,* 333 U.S. 257, cited by petitioner at page 23 of his brief is inapplicable. There the inquiry was being conducted by a "one man grand jury" and the defendant was not afforded an opportunity to be represented by counsel or have a full and fair hearing. The adjudication of contempt was also largely based on the testimony of one witness who had previously testified in secret and who was not subjected to cross examination by the defendant. Likewise in *Greene* v. *McElroy,* 360 U.S. 474, 79 S. Ct. 1400, cited by petitioner, the accused was also not permitted to confront or cross examine witnesses nor was he allowed to examine files, minutes or records on which the revocation of his security clearance was based. The procedures below were imminently fairer in this case than in any other case referred to by petitioner.

CONCLUSION

The petition for the Writ of Certiorari should be granted for the reasons referred to herein.

Dated: Brooklyn, New York
April 1, 1968

Respectfully submitted,

AARON E. KOOTA,
District Attorney,
Kings County

STANLEY M. MEYER,
Assistant District Attorney,
of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1205.

DAVID A. GOLDNER,
Petitioner,

v.

EDWARD S. SILVER,
District Attorney, Kings County, State of New York,
Respondent.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI.

BERNARD A. BERKMAN,
LARRY S. GORDON,
JOSHUA J. KANCELBAUM,
GERALD A. MESSERMAN,
1320 Superior Building,
Cleveland, Ohio 44114,
Counsel for Petitioner.

EDWYN SILBERLING,
1501 Franklin Avenue,
Mineola, New York 11501,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-8647

TABLE OF CONTENTS.

Reply Brief of Petitioner to Respondent's Brief on Petition for Writ of Certiorari 1

Conclusion 14

Appendix A. American Bar Association Statistics on Disbarment, by State, for the Years 1963-64, 1964-65 and 1965-66 15

TABLE OF AUTHORITIES.

Cases.

Cohen v. Hurley, 366 U. S. 117 (1961) 6, 9

Escobedo v. Illinois, 378 U. S. 478 (1964) 4

Fahy v. Connecticut, 375 U. S. 85 (1963) 13

Gideon v. Wainwright, 372 U. S. 335 (1963) 4, 5

Griffin v. Illinois, 351 U. S. 12 (1956) 4

Jackson v. Denno, 378 U. S. 368 (1964) 4

Johnson v. New Jersey, 384 U. S. 719 (1966) 4, 5, 8

Linkletter v. Walker, 381 U. S. 618 (1965) 3, 4, 5

Mapp v. Ohio, 367 U. S. 643 (1961) 5, 11, 13

Miranda v. Arizona, 384 U. S. 436 (1966) 4, 8

Ruffalo, In re, ___ U. S. ___, 36 U. S. L. Week 4284 (April 8, 1968) 2, 14

Shapiro v. United States, 335 U. S. 1 (1947) 2

Spevack v. Klein, 385 U. S. 511 (1967) 1, 2, 3, 6, 8, 9

Tehan v. United States ex rel. Shott, 382 U. S. 406 (1966) 3-4, 8

Constitution of the United States.

Fourth Amendment ---------- 3

Fifth Amendment ---------- 3

Sixth Amendment ---------- 5

Fourteenth Amendment ---------- 5

In the Supreme Court of the United States

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v.

EDWARD S. SILVER,
District Attorney, Kings County, State of New York,
Respondent.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI.

Respondent's brief demonstrates that the State of New York joins in the petition for writ of certiorari as to the Fourth Amendment argument [1] presented by petitioner and opposes the petition as to the general due process arguments [2] therein contained. Without in any way taking issue with respondent's contention that the scope and retrospective application of *Spevack v. Klein,* 385 U. S. 511 (1967), particularly with respect to the breadth of the subpoena power of state authorities in disciplinary proceedings against attorneys, are important questions raised clearly in the case at bar which require resolution by this Court, the recent announcement of this Court's opinion

[1] Argument I, pp. 24-33, Petition for Writ of Certiorari.

[2] Arguments II and III, pp. 33-40, Petition for Writ of Certiorari.

in *In re Ruffalo*, ____ U. S. ____, 36 U. S. L. Week 4284 (April 8, 1968) and some misleading statements in respondent's answer brief compel this reply.

References to, and commentary upon, matter in respondent's brief will follow in the order of its appearance in the brief of the respondent.

I.

The parties' joint recognition of the importance of the questions of scope and retrospectivity of *Spevack* as that decision affects Fourth Amendment consideration of the appropriate breadth of state subpoena power in disbarment proceedings, ought not to obscure their basic differences in analysis of the problems and in the result sought. Despite respondent's contention [3] that "the scope and application" of *Shapiro v. United States*, 335 U. S. 1 (1947) and "the question of whether an attorney might be disbarred for refusal to produce records he was required lawfully to keep as a proper part of his being a licensee in a high calling" are here in issue, petitioner categorically denies that these questions are dispositive of the instant case. The subpoena whose breadth petitioner attacks compelled the production of all sorts of *private* papers not required to be kept by petitioner because of his status as a lawyer—not records required to be kept by law. Petitioner's complaint is that the subpoena was unconstitutionally broad and indefinite and reached private papers no man—even a lawyer—should be compelled to disgorge in such wholesale fashion. The constitutional infirmity of the subpoena is not cured by respondent's bald assertion [4] that, "although the subpoena appears, by the decision in *Spe-*

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[3] Respondent's Brief, p. 4.

[4] Respondent's Brief, p. 4.

vack, to have been too broad * * * the records actually used against petitioner at the disciplinary hearings related only to his function as an attorney * * *." For the specific harm of general warrants which the Fourth Amendment requirement of particularity was designed to guard against is precisely that which occurred here—the state rummaged indiscriminately through petitioner's records and used whatever small proportion of them it desired to introduce in evidence. Regardless of the *amount* of seized material actually offered in evidence against petitioner, his Fourth Amendment right to privacy was violated by the sweeping compulsory process of the subpoena itself.

Because petitioner is seeking to extend the rule of law of *Spevack v. Klein*, decided January 31, 1967, to the circumstances surrounding his disbarment proceeding, which took place between November 15, 1957 (the date upon which he was first served the confiscatory subpoena by the judicial inquiry of which he complains) and March 1, 1965 (the date of denial of rehearing on his application for certiorari to the United States Supreme Court, which ended his direct appeal) respondent has suggested that the retrospective application of *Spevack* is here placed in issue. Because petitioner here seeks to extend the rule of *Spevack* from Fifth to Fourth Amendment protections, it may well be that no retroactivity question is raised; for the first case to espouse or extend a constitutional principle is not ordinarily subject to such scrutiny. But if it should be determined that *Spevack* is controlling in the instant case, some discussion of the question of retroactive application of new constitutional rules may be in order.

This Court has had to deal with several retroactivity problems generated by its recent departures from *stare decisis* in many areas of criminal due process. E.g., *Linkletter v. Walker*, 381 U. S. 618 (1965); *Tehan v. United*

State ex rel. Shott, 382 U. S. 406 (1966); *Johnson v. New Jersey,* 384 U. S. 719 (1966).

In a number of areas, such as right to counsel, *Gideon v. Wainwright,* 372 U. S. 335 (1963), exclusion of coerced confessions, *Jackson v. Denno,* 378 U. S. 368 (1964) and free transcripts furnished to indigents for purposes of appeal, *Griffin v. Illinois,* 351 U. S. 12 (1956), the Court has applied complete retroactivity to its constitutional decisions. In other areas, such as the search-and-seizure exclusionary rule, *Linkletter v. Walker, supra,* prohibited comment by the prosecutor on the failure of the accused to take the witness stand, *Tehan v. United States ex rel. Shott, supra,* and the police interrogation requirements of *Miranda v. Arizona,* 384 U. S. 436 (1966) and *Escobedo v. Illinois,* 378 U. S. 478 (1964), *Johnson v. New Jersey, supra,* more limited retroactivity rules have been employed.

Apparently the rule to be extracted from these disparate results is that where the new constitutional rule affects "the fairness of the trial—the very integrity of the fact-finding process" and involves "the clear danger of convicting the innocent," *Linkletter v. Walker,* 381 U. S. 618, 639 (1965), where its retroactive application would not "seriously disrupt the administration of our criminal laws," *Johnson v. New Jersey,* 384 U. S. 719 (1966), and where "other safeguards are [not] available to protect the integrity of the truth-determining process at trial," *Johnson v. New Jersey,* 384 U. S. 719, 729 (1966), the expanded version of the Bill of Rights must be applied retrospectively.

This Court has, however, been careful to point out that "the retroactivity or non-retroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional

rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary * * * [W]e must determine retroactivity 'in each case' by looking to the peculiar traits of the specific 'rule in question.'" *Johnson v. New Jersey*, 384 U. S. 719, 728 (1966).

Applying these principles to the instant case, several observations must be made.

First, this case does *not* require the retroactive application of the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643 (1961). For this case was pending on direct appeal at the time *Mapp* was decided, and petitioner urged the exclusion of the illegally seized records in timely and detailed fashion both to the Appellate Division (SR. 72-117) and the Court of Appeals (Brief of Respondent-Appellant, pp. 12-15, 24-26. Reply Brief of Respondent-Appellant, pp. 4-5). And it is clear that application of the expanded protections of recently announced decisions to state cases then pending on direct review is perfectly appropriate, and not a matter of retroactive application at all. *Linkletter v. Walker*, 381 U. S. 618, 627 (1965).

Second, there is no basis to conclude that the constitutional infirmity of denial of the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments presents a problem of retroactivity. For *Gideon v. Wainwright*, 372 U. S. 335 (1963), which absorbed the Sixth Amendment right to counsel into the Fourteenth as a matter of due process was not only decided while the instant case was pending on direct review, but *Gideon* has been given complete retroactive application. See *Johnson v. New Jersey*, 384 U. S. 719, 727 (1966).

Third, the general Fourteenth Amendment violations with which petitioner contends his disbarment proceed-

ing was permeated present. no new principle of law to which a question of retroactivity could possibly attach, *except as to the applicability of such well-settled principles to state disbarment proceedings as well as state criminal prosecutions.*

The only question which then remains for determination on the issue of retroactive application of newly-announced constitutional doctrine is whether *Spevack v. Klein,* 385 U. S. 511 (1967), which applied specific due process protections to state disbarment proceedings and overruled *Cohen v. Hurley,* 366 U. S. 117 (1961), a decision squarely to the contrary, is applicable to petitioner, whose case had been finally adjudicated on direct review before the publication of *Spevack.*

While there has been no square holding of this Court dealing with the extent to which *Spevack* should be retrospectively applied, its enunciated principles of retroactivity compel the conclusion that petitioner is now entitled to any constitutional relief which *Spevack* offers.

What could more centrally affect "the very integrity of the fact-finding process" than the state's broad and roving search and confiscation of all of petitioner's records, refusal to permit him access to his own papers for a three-year period between their seizure and his hearing, and its leisurely selection of the eclectric morsels of such documentary evidence to be used against petitioner, without giving him an opportunity to introduce any of the rest of such documentary evidence which might have been exculpatory, where the determination of his guilt or innocence of professional wrongdoing turned upon testimony about, and inferences drawn from, those very documents?

What could more sharply evoke "the clear danger of convicting the innocent" than finding petitioner guilty of

an offense with which he had not been charged, against which he could not have prepared a defense, and of which he received notice for the first time upon the finding of guilt itself?

In the instant case the Referee made a serious factual error in his findings because of the inability of appellant's counsel to properly prepare without the appellant's records. The Referee relied upon the testimony of an accountant testifying on behalf of respondent. This accountant gave the impression that ledger entries indicated to what specific case disbursements, entered into such ledger by appellant's accountant, were attributable. The fact is that the ledger entries did no such thing. The ledger book rarely had entries reflecting expenses attributable to a particular case. In addition, the determination of whether expenses were taken "from the top," a finding of the Referee, is not supported by the ledger. Had the ledger and the checkbook stubs of the appellant been available to his counsel, in all probability he would have been able to expose this error of fact and change the outcome of the hearing. The same glaring inaccuracies appear in the accountant's handling of the figures in the Groeger case (H241-245). In trying to make figures reflect the accountant's theory of expenses being taken from the top, he lists in his testimony a total of $5,114.00 expended where actually $5,000.00 was the total amount available for distribution. Counsel was hamstrung from effective cross examination without the source materials, the ledgers and the checks.

In fact, when new counsel was retained for the purpose of appeal, he examined the records of the petitioner after receiving permission to do so from the Appellate Division. As a result, he was able to discover the above facts, and incorporated them in a motion made April 11,

1963 before the Appellate Division seeking reconsideration and a new hearing. This motion was denied. Some of these errors are so glaring that the accountant's credibility and ability are seriously open to doubt. For instance, in the Zucker case (H215-219), the accountant's figures total $7,118.80 as opposed to a total settlement figure of $7,000.00. In addition, the accountant found expense items which exceeded the amount he allocated. Nevertheless, he sought to force conclusions but did not account for discrepancies which challenged these conclusions.

Nor can the record reveal what evidence the defense would have presented to rebut the charges of subornation and perjury had petitioner been apprised in timely manner that he was standing trial on these counts as well as the thirty-three counts of which he was actually notified.

The other factors involved in the determination of retroactivity remain to be considered. Would retroactive application of *Spevack* "seriously disrupt the administration of our criminal laws"? Petitioner thinks not. The retroactive application of *Spevack* does not present the specter of thousands of violent, caged felons freed to prey upon society by a single retroactive constitutional stroke, either because the police did not give the *Miranda* warnings in the interrogation room, *Johnson v. New Jersey*, 384 U. S. 719 (1966), or because the prosecutor commented adversely to the jury upon the failure of the accused to take the stand in his own defense, *Tehan v. United States ex rel. Shott*, 382 U. S. 406 (1966). *Spevack* only applies existing standards of due process to the discipline of lawyers. Throughout the nation, state authorities have, since 1963, disbarred from 62 to 72 lawyers annually, at an average of about 1.4 per year per

state. See national statistics on disbarment for the years 1963-64, 1964-65 and 1965-66 supplied by American Bar Association per correspondence January 24, 1968, App. A, *infra*, p. 15 ff. It may be presumed that these disbarred lawyers were found guilty of, at most, non-violent, "paper" offenses. The strain upon the administration of justice in this sphere seems inconsequential when weighed against the manifest harshness and finality of depriving a lawyer of his livelihood for life by procedures which fall short of constitutional minimums.

A word about the third factor which has moved this Court in matters of retroactive application of recently-expanded constitutional protections: whether alternate safeguards "are available to protect the integrity of the truth-determining process at trial." Although it has been here suggested that *Spevack* affects but a small class of prosecutions, it is equally true that as to all of the prosecutions in that class which *Spevack* affects, it affects them *totally*. But for *Spevack*, an accused lawyer is helpless in the hands of a state bent upon stripping his profession from him. With the imprimatur of *Cohen v. Hurley*, a state could (and did) devise its own ground rules for disbarment of lawyers, with the rules of fact-finding, concepts of proof of guilt, presumptions of innocence and other due process considerations far below constitutional standards. Thus a lawyer fighting disbarment, whose sentence, upon a guilty finding, will in practical effect exceed all but the most severe criminal penalties, has little but *Spevack* and its implications "to protect the integrity of the truth-determining process at trial." By every rule of construction, *Spevack* should be given broad retrospective application.

II.

The argument made at page 6 of respondent's brief that the refusal of the New York courts to return petitioner's records to him after they were confiscated by subpoena, somehow converts an illegal search, seizure and detention of records into lawful conduct is more than "an exercise in semantics." Respondent's contention misses the entire thrust of petitioner's argument; for if the search and seizure and detention of records were illegal in the first instance, as petitioner contends, no judicial imprimatur of a state court can convert such acts into lawful behavior; rather, the court orders denying petitioner's motions for relief are themselves in contravention of constitutional command, and consequently, nullities at best.

Respondent attaches great significance to the fact that "the only demand petitioner ever made * * * was for the physical return of these records. He never asked * * * that he be allowed to use, work with, or copy them" (Respondent's Brief, p. 7). So far as the contentions made by petitioner that the records were acquired by means of illegal search and seizure are concerned (Petition, 24-33), the respondent's argument is hopelessly irrelevant. If, as petitioner contends, the law enforcement authorities were not entitled to possession of the documents at all, it can hardly be seriously contended that they could in any manner retain the option to select for the petitioner the mode by which he might use his own records. Even so far as the charge of illegal detention of the records is concerned (Petition, pp. 33-37), it is evident that the legal and extralegal action taken by petitioner to secure the *broad* relief of return of the documents at least includes the *more narrow* relief of permitting access to them, upon the principle that the *greater* request includes the *lesser*. It cannot now be denied that a court to whom such application was

made had the jurisdiction to fashion a more narrow remedy than was sought by petitioner, if it had wished to do so.

Respondent urges at page 10 of his brief (1) that petitioner has not properly preserved for review by this Court the issues raised in his petition for certiorari; and (2) that he has not demonstrated prejudicial error requiring reversal of the order of disbarment below.

The indelible fact is that petitioner did all in his power at the earliest possible time to raise the issues of illegal search and seizure and due process of law now presented to this Court. The record is replete with judicial and extra-judicial pre-hearing attempts by the petitioner to have his records returned to him after they were confiscated by the Judicial Inquiry pursuant to subpoena *duces tecum* in November, 1957 (See P. 5-6; SR. 74-84; BO. 2*). The dilemma which compelled petitioner to respond to the subpoena of the Judicial Inquiry in the first instance has been outlined elsewhere (P. 40-41; and see SR 136-137). And at the hearing itself, which, it must be noted, antedated by some six months this Court's ruling in *Mapp v. Ohio,* 367 U. S. 643 (1961) that the exclusionary rule was a constitutional command upon the states, petitioner was precluded from moving to suppress the confiscated records or from otherwise objecting to their admission as evidence by the Special Referee's exposition of the law of evidence *as it then existed in New York* dur-

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* The Petition for Writ of Certiorari is referred to throughout as "P" followed by a page reference. The Brief in Opposition to Petition for Writ of Certiorari is referred to as "BO" followed by a page reference. The transcript of the hearing before the Special Referee is referred to as "H" followed by a page reference. The Report of the Special Referee is referred to as "Report." The Supplemental Record is referred to as "SR"; Supplemental Record A is referred to as "SRA." Numerical references following "SR" and "SRA" are to folios unless otherwise indicated.

ing the direct interrogation of the accountant called by the Assistant District Attorney:

> "Q. Will you explain to the Court how these books and records came into your possession?
>
> A. I think they came into my possession by subpoena.
>
> Special Referee: Tell me, does it make any difference how they got there?
>
> Mr. Markowitz [Assistant District Attorney]: I want to introduce them.
>
> Special Referee: If you have the books, introduce them. *In this State, even if they are illegally obtained, you can use them.*
>
> Mr. Gittleson [petitioner's counsel]: That is too bad, but it is a fact.
>
> Special Referee: I am afraid I agree with you." (H. 211) (Emphasis supplied).

Moreover the record denies respondent's contention that petitioner has not claimed or attempted to show any court that the confiscated records contained items which would have been helpful to him at the hearing before the Special Referee. (BO 10). For the record abundantly reflects not only the frustrations and difficulties under which petitioner and his counsel were required to function at the hearing, but the applications for relief addressed to the judiciary as well.

It must be borne in mind that, as the evidence developed, it became crucial to determine whether the proceeds of certain of petitioner's checks were actually received by the named payees and whether certain of petitioner's clients were charged sums in excess of the actual expenses in their cases. The ultimate resolution of these matters of fact against the petitioner by the Special Referee was a principal ingredient of the findings of subornation and perjury which resulted in petitioner's disbarment.

It is therefore evident that the confiscated checks and checkstubs, the ledgers and account books were vital to the defense, both as direct evidence and as a basis for intensive cross-examination of the accountant, whose testimony as an expert witness was the heart of the District Attorney's case. But the defense was denied the use of these records. Instead they were introduced piecemeal, eclectically, at the sole whim and caprice of the district attorney, who was in a position rarely attained by an advocate,—a position in which he could sift the evidence *ex parte* and offer the documentary evidence which aided *his* theory of the case and, with impunity, suppress that which might aid his adversary.

Furthermore, petitioner's dilemma with regard to the seizure and unavailability of the confiscated records was presented after the hearing in timely and detailed fashion to both of the courts below: The Appellate Division (SR. 72-117) and the Court of Appeals of the State of New York (Brief of Respondent-Appellant, pp. 12-15; 24-26; Reply Brief of Respondent-Appellant, pp. 4-5), particularly and immediately after this Court announced its decision in *Mapp v. Ohio*, 367 U. S. 643 (1961).

The prejudice to petitioner resulting from the illegal seizure and detention of his records has been amply demonstrated in each court below and in this Court. Since this Court has rejected the notion that state courts are the final arbiters of whether unconstitutional procedures have tainted a hearing or trial so as to require reversal, and instead, reviews state court proceedings to determine whether there is a *reasonable possibility* that the unconstitutional procedures *might have contributed* to the result, *Fahy v. Connecticut*, 375 U. S. 85 (1963), the record below clearly meets this broad test of reviewability and demonstrates the necessity for reversal here.

III.

Respondent's attempt to belittle the constitutional infirmity of a disbarment proceeding in which petitioner was found guilty of an offense of which he was never charged, never had notice or opportunity to defend, is pitiful, particularly in the light of this Court's most recent affirmation that disbarment proceedings "are adversary proceedings of a quasi-criminal nature," in which "[t]he charge must be known before the proceedings commence." *In re Ruffalo*, __ U. S. __, 36 U. S. L. Week 4284 (April 8, 1968). "[The] absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner," in the instant case as in *Ruffalo* "of procedural due process." Ibid.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in his petition for writ of certiorari, petitioner renews his prayer that the petition for writ of certiorari be granted.

Respectfully submitted,

BERNARD A. BERKMAN,
LARRY S. GORDON,
JOSHUA J. KANCELBAUM,
GERALD A. MESSERMAN,
Counsel for Petitioner.

EDWYN SILBERLING,
Of Counsel.

APPENDIX A.

AMERICAN BAR ASSOCIATION.
1155 East 60th, Chicago, Illinois 60637

January 24, 1968

Via Air Mail

Bernard A. Berkman, Esquire
1320 Superior Building
Cleveland, Ohio 44114

Dear Mr. Berkman:

Pursuant to our telephone conversation of today, we are enclosing statistics on disbarment, by state, for the years 1963-64, 1964-65 and 1965-66. We hope this information will be helpful to you.

If we may assist you further, please do not hesitate to call upon us.

Sincerely yours,

(Mrs.) Suzanne G. Manker
Information Service

rws
Enclosures

Sept. 1, 1963 - Aug. 31, 1964

	name struck rolls	disbarred	suspended	reinstated	license cancelled	resigned	censured
Alabama		2	4			6	
Alaska							
Arizona		4					
Arkansas		2					
California		5	6	2		4	
Colorado	2	1	1	1			
Connecticut		1	1			1	
Delaware			1				
D. of Colum.							1
Florida		6	9	3		2	
Georgia							
Hawaii							
Idaho			1	1			
Illinois	11	1	2	2			7
Indiana						2	
Iowa			1	3		1	
Kansas						2	
Kentucky							
Louisiana						1	
Maine				1			
Maryland		5	4	1			
Massachusetts							
Michigan		5	6	4		3	
Minnesota		5	1				
Mississoppi	2				1		
Missouri		3	2	1			
Montana		1					
Nebraska							
Nevada							
N. Hampshire							
N. Jersey		1	4			2	
N. Mexico							
New York							
1st Dept.	10	4	13	4			
2nd Dept.	4	1	5	3			
3rd Dept.							
4th Dept.		1	2	1			
N. Carolina		1			1		
N. Dakota				1			
Ohio		2	7			7	
Oklahoma			3	2		2	
Oregon		1	4	2			
Penn.		3	1			1	
Puerto Rico				1			
Rhode Island							
S. Carolina							
S. Dakota						3	
Tennessee							
Texas		3	6	5	1		
Utah							
Vermont							
Virginia				2	1		
Virgin Islands							
Washington		3	1	1			
West Virginia		1	1		1		
Wisconsin							
Wyoming							
TOTALS:	29	62	86	41	5	37	8

Sept. 1, 1964 - Aug. 31, 1965

	name struck rolls	disbarred	suspended	reinstated	license cancelled	resigned	censured
Alabama				3		14	
Alaska				1			
Arizona							
Arkansas				1			
California		6	22	5			
Colorado			2				
Connecticut		2	2				
Delaware							
D. of Colum.		3	7			1	
Florida		7	2	2		3	
Georgia			1				
Hawaii							
Idaho		1					
Illinois	7	2	4				5
Indiana		1		1			
Iowa			3				
Kansas							
Kentucky							
Louisiana				2			
Maine				2			
Maryland		2	2				
Massachusetts		6					
Michigan		1	4	5		2	
Minnesota		2					
Mississippi							
Missouri		3		1			
Montana							
Nebraska		3					
Nevada							
N. Hampshire							
N. Jersey		3	6	2			
N. Mexico							
New York							
1st Dept.	7	6	12	8			4
2nd Dept.		9	4	1		4	
3rd Dept.	1						
4th Dept.							
N. Carolina	1						
N. Dakota				1			
Ohio		1				5	
Oklahoma		2	2	1		3	
Oregon		4	4	1			
Penn.		4					
Puerto Rico							
Rhode Island							
S. Carolina		1					
S. Dakota							
Tennessee			4		3		
Texas		1	3	1			
Utah		1	1				
Vermont			3	1	1		
Virginia							
Virgin Islands							
Washington	2				1		
West Virginia			1				
Wisconsin		1	1	1	1		
Wyoming							
TOTALS:	18	72	90	40	6	32	9

CERTIORARI DENIED

Sept. 1, 1965 - Aug. 31, 1966

	name struck rolls	disbarred	suspended	reinstated	license cancelled	resigned	censured
Alabama					1		
Alaska			1	1			
Arizona		2					
Arkansas							
California		4	11	14		4	
Colorado	1			1			
Connecticut			2	1	1	1	
Delaware	2						
D. of Colum.		3	1	8			
Florida		3	4	2			
Georgia			2				
Hawaii							
Idaho				1			
Illinois	4	6			6		2
Indiana		1		1		2	
Iowa			4	1			
Kansas	1		1				
Kentucky		1	1				
Louisiana		2					
Maine				1		2	
Maryland	1	5	1			1	
Massachusetts		2	3				
Michigan		2		1		4	
Minnesota		2					
Mississippi							
Missouri		1	1			2	
Montana		2	1				
Nebraska							
Nevada			1				
N. Hampshire				1			
N. Jersey		2	7	2		3	
N. Mexico			1				
New York							
1st Dept.	7	6	3	9			
2nd Dept.	2	4	8	5			
3rd Dept.	2		2				
4th Dept.		1		1		4	
N. Carolina				1	1		
N. Dakota							
Ohio		2	4			2	
Oklahoma		3	3			3	
Oregon		4		2		1	
Penn.		3	3			1	
Puerto Rico		2				1	
Rhode Island		1					
S. Carolina		1					
S. Dakota						1	
Tennessee		1		2	2		
Texas			4			1	
Utah		2					
Vermont		1					
Virginia				2			
Virgin Islands							
Washington		1				1	
West Virginia				1			
Wisconsin			4	1			
Wyoming							
TOTALS:	20	70	73	59	12	34	2